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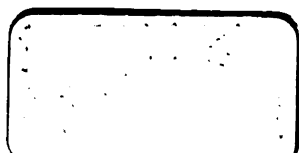
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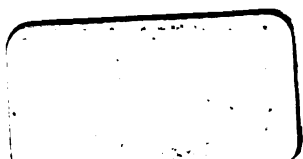




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479
REPORTS OF CASES

IN LAW AND EQUITY, ARGUED AND DETERMINED IN THE

SUPREME COURT OF GEORGIA,

AT ATLANTA.

Parts of January and July Terms, 1873.

VOLUME XLIX.

By HENRY JACKSON, REPORTER.

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OF THE

SUPREME COURT OF GEORGIA,

DURING THE PERIOD OF THESE REPORTS.

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HON. H. K. McCAY, JUDGE *Americus.*
HON. R. P. TRIPPE, JUDGE *Forsyth.*

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 " " HON. GEORGE D. RICE.....Gainesville.

*The terms of office of Judges TWIGGS, HARRELL, ALEXANDER and DAVIS having expired on January 1st, 1873, Judges JOHNSON, KIDDOO, HANSELL and RICE were respectively commissioned as their successors.

NOTE.

By Act of 1866, (section 4270 of the Code) the decisions of the Supreme Court are required to be "announced by a written synopsis of the points decided." The decisions thus announced from the bench by Judges McCAY and TRIPPE, are made the head-notes to the cases. The decisions announced by Chief Justice WARNER are published as his opinions, the head notes being made by the Reporter. All other head-notes by the Reporter are designated by (R.)

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CASES
ARGUED AND DETERMINED
IN THE
Supreme Court of Georgia,
AT ATLANTA,

JANUARY TERM, 1873.

PRESENT—HIRAM WARNER, CHIEF JUSTICE.
H. K. McCAY,
ROBERT P. TRIPPE, } JUDGES.

ALVIN K. SEAGO *et al.*, plaintiffs in error, *vs.* WALTER B.
BASS, defendant in error.

Land was sold at auction by S.; C. gave notice at the sale of claim of title; S. replied that he would warrant the title, and would give to the purchaser a bond, with ample security, to indemnify him against the loss of any sum that might be expended in improvements upon said property. Complainant purchased for \$1,010 00, and paid one-fourth of the purchase money in cash, and gave his three notes for the remaining three-fourths, taking the usual bond for titles from S. Two of these notes were paid at maturity. The remaining one was dishonored, because C. had commenced suit for the land. In the meantime, complainant had placed improvements thereon to the value of \$400 00. S. obtained judgment for the amount of the last note, has filed a deed to the land in the clerk's office, and has levied the execution upon the same. The Chancellor did not commit error in enjoining the sale, the injunction to be dissolved upon bond and security being filed by S. in the sum of \$1,000 00, conditioned to indemnify complainant against loss on his improvements in case of the failure of his title.

Seago et al. vs. Bass.

Injunction. Bond for title. Before Judge HOPKINS. Fulton county. At Chambers. May 10th, 1873.

For the facts of this case, see the decision.

B. F. ABBOTT, for plaintiff in error.

E. F. HOGG, for defendant.

WARNER, Chief Justice.

The complainant filed his bill against the defendant, praying for an injunction to restrain the sale of a city lot in the city of Atlanta, which had been levied on by the sheriff to satisfy an execution in favor of the defendant against the complainant. The presiding Judge granted the injunction prayed for, to be dissolved when the defendant should give bond and security in the sum of \$1,000 00, conditioned to indemnify the complainant against loss for any sum he may have expended in improvements on the property mentioned in complainant's bill, because of the failure of defendant's title thereto, said bond to remain of force until the final hearing of the case. To the granting the injunction and order, the defendant excepted. The complainant alleges as a ground for the equitable interference of the Court, that in February, 1871, the defendant offered the city lot in question for sale at public auction, when one Coughlin and wife gave public notice of their title to the property, whereupon, the defendant assured the complainant and other bidders present, that his title to the property was perfect, that he would warrant it to be so, and would give to the purchaser a bond with ample security to indemnify him against the loss of any sum that might be expended in improvements, or otherwise, upon said property. This allegation is supported by the affidavit of Wallace, who was present at the time. The complainant alleges that because of this statement of the defendant, he purchased the lot for the sum of \$1,010 00, paying one-fourth of the purchase money therefor, and giving his three separate notes for the

other three-fourths of the purchase money, two of which were paid at maturity, the other was not paid for the reasons alleged in complainant's bill. The defendant, at the time of the sale, executed and delivered to the complainant a bond to make him a title to the lot when the purchase money should be paid. The complainant alleges that he has made improvements on the lot to the value of \$400,00, and that Coughlin and wife have instituted suit for the lot, and he fears they will recover the same. The defendant has obtained judgment on the last note given for the lot, against the complainant, and execution has issued thereon, been levied on the lot as the property of the complainant, the defendant having filed his deed thereto in the clerk's office, as provided by the statute.

If Coughlin and wife recover the lot on their title, and Seago's title fails, then the complainant would be entitled in a suit on his bond for a breach thereof, to recover the value of the lot at the time of the breach, with interest thereon, which would include the value of his improvements. This he cannot do if Seago is permitted to file his deed and sell the lot for the unpaid purchase money due therefor, and thereby cancel the complainant's bond for title, as he is proceeding to do. The complainant's bond for title, which he now holds, will protect him, for the reason that the measure of damages for the breach of a bond for title to land, is the value of the premises *at the time of the breach*, with interest thereon, whereas, upon a covenant of warranty of title to land the damages would be only the purchase money, with interest thereon from the time of the sale: Code, 2898, 2897.

In view of the facts disclosed in this record, we will not interfere with the exercise of the discretion vested by law in the Court in granting the injunction in this case.

Let the judgment of the Court below be affirmed.

Kelly vs. The State of Georgia.

CHARLES KELLY, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

1. There was no error in admitting the record of the indictment and conviction for the opprobrious words. It went to show a motive and to explain the threats and words of the prisoner. (R.)
2. The evidence in this case is of such a character that this Court cannot say that the presiding Judge committed an error in refusing a new trial. (R.)

Criminal law. Evidence. New trial. Before Judge GREENE. Newton Superior Court. September Adjourned Term, 1872.

Charles Kelly was tried for the murder of William H. Hardeman, and found guilty. A motion was made for a new trial on two grounds:

1st. That the Court had erred in admitting as evidence against the defendant the record of an indictment and judgment thereon, against the prisoner for using opprobrious words, etc., against the deceased, on which, some months before the killing, he had been tried, found guilty and punished.

2d. That the verdict of guilty by the jury was strongly and decidedly against the evidence.

The evidence made the following case:

The killing was done on the 19th of August, 1872, in the evening, shortly after dark; the deceased was shot by an assassin as he stood in or near his own door, from a clump of plum trees on the opposite side of the road from the house.

The prisoner had for some time before entertained feelings of strong enmity to deceased; in fact, before the killing, he had gone to the deceased's house, which was a mile and a half from prisoner's, and stealthily shot deceased's dog in his own yard.

Not long after this he had confessed to one Knight that he shot the dog, and went out of the yard to kill the two-legged dog if he should come out.

At another time he told Knight he did not want to do it, but if Hardeman bothered him he would kill him; again

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he had said to him, next time he would kill the two-legged dog.

In the winter or spring before the killing, one Harvey had heard prisoner say he intended to put Hardeman out of the way with "these or something longer," putting his hand where he usually wore his pistols.

At the May term of Newton Superior Court he had been tried and found guilty and punished for having, in May, 1871, used to, and in the presence of Hardeman, opprobrious words, to-wit: "You are a damned liar and a damned coward;" and as he was returning home from the trial, he had said to one Crawford that he had been advised to kill Hardeman, but there was a better way; and, again, that he never would be satisfied until he tried him with these—putting his hand on his pistol.

In June, before the killing, he had threatened to kill deceased in presence of Mr. Calhoun, and to the same man he had, at another time, said—speaking of deceased—"I will shoot his damned heart out," shaking his pistol in his hand, "I told Tom Osborn so this morning."

About a month before the killing, on hearing Mr. Bobo declare that if Hardeman said to his face what he had heard, he would kill Hardeman or Hardeman should kill him, he offered to aid Mr. Bobo in killing deceased.

About three weeks before the killing, he had said to Mr. Gregory that he would take a stick and beat deceased till the life was only just in him, and that he would keep his pistol at his head whilst he was doing it.

On the very day of the killing, having shot a dove, as he was reloading his gun, he had said to Mr. Calhoun (to whom he twice at other times, on previous occasions, said he intended to kill Hardeman,) that he was loading his gun this time for higher game than he usually shot at.

In tracing the track of the assassin, it was found that he wore a number seven or eight shoe, and one of the shoes, probably the right, though this was uncertain, had a hole in it so that the big toe and the one next it made an impression

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on the soft earth. From the evidence in the record, it is fair to infer that this mark of the toes was made when the assassin was crawling, dragging his feet behind him, and when he was running, though from the record this is not clear. Mr. Boyd testified that on the fourth day after the killing, the prisoner came to his house, wearing shoes of that number, the left of which had a hole exposing the big toe and the next. A Mr. Brown, who lived at the prisoner's father's, testified that prisoner had a pair of shoes which he often wore, having such holes, though from Mr. Boyd's statement the holes were only in the upper leather and not in the sole.

There was a coroner's inquest on the night of the killing, and the next morning one of the jury went to prisoner's on business; prisoner got into the juryman's buggy and rode with him about a mile; asked him what was the evidence—whether any warrant had been issued, and told the juryman he had heard they were going to arrest *him*, prisoner, and hoped if he heard of any such warrant he would let him know.

A note had been written to the grand jury, trying to cast suspicion on Mr. Bobo, and on a man by the name of Davis, from certain threats it was supposed they had made. Bobo admitted saying to the prisoner that if Hardeman said to his face what he heard, either he or Hardeman should die. Davis denied any threats, or any ill-will to Hardeman, and Bobo said he had seen Hardeman and found he had not so said, and all was well with them. There was evidence that this note was in Kelly's handwriting, but there was also evidence of the prisoner's brother contradicting this. There were also papers in evidence to enable the jury to make a comparison of hands.

On the other hand it was in proof by prisoner's brother, his male and female cousins, and by his sister, that he was at home, a mile and a half or two miles from the scene of the tragedy at the very time it was proved to have occurred. This was also proved by a man named Jeffries, and his, Jeffries', mother, who lived only two hundred and fifty yards from the house of prisoner's parents, and with whom he was

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at that time boarding. His brother, sister and female cousin testifying they heard him and young Jeffries talking and laughing, and the male cousin saying he saw him through the door of Mrs. Jeffries' house standing by the table; the time was marked by the rising moon, the killing also taking place just as it was rising. Jeffries and his mother both declared that prisoner was at their house from before sundown till bed-time, and had gone to bed on the floor, and the old lady said that the one and one-half hours she staid up, she had prisoner in sight all the time. Jeffries and his mother were proven by several witnesses to be of bad reputation and not worthy of belief in a Court of justice. The sister was attacked for the same reason; the evidence of the nephew was open to some strictures as to the probability, under the circumstances, of seeing a man after dark, at the distance of one hundred and fifty yards, inside of a small house with but one room, and no windows, through the open door, there being no proof of any light, while the brother had shown himself to have made threats to deceased and to have refused to go to his funeral as that of a damned dog.

The motion was overruled, and the defendant excepted upon each of the aforesaid grounds.

A. M. SPEER; J. J. FLOYD, for plaintiff in error.

T. B. CABINESS, Solicitor General, by PEEPLES & HOWELL; CLARK & PACE; L. B. ANDERSON, for the State.

McCAY, Judge.

1. We hardly think counsel for the plaintiff in error serious in the objection they made to the admission of the indictment, judgment, etc., for the misdemeanor. If the fact that the defendant had been indicted and punished at the deceased's instance, was material, and this would seem to be a legitimate fact going to show a motive for anger expressed by prisoner against deceased—if such a fact was material, that is, competent—surely the record was the best evidence of it. That

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he was angry then does not prove he retained that anger, but it is a fact which, with other facts, may fairly be used to get at the feelings of the prisoner on the day of the killing.

2. The real question in this case is, whether this tribunal—a Court of law, composed of three men, not of the vicinage—shall declare the verdict of the jury, chosen by law, and required and authorized by law to pass upon the facts, not supported by the evidence. We have again and again declared our opinion that this Court has no power to act as a Court of appeal from the verdict of the jury. Indeed, it is only by a sort of fiction that we have jurisdiction at all over a verdict of the jury upon the facts. The Constitution expressly declares that this Court shall have no original jurisdiction, but shall be a Court *alone* for the trial of errors *in law or equity* from the Superior Courts, etc. The Constitution gives to the Superior Court the right to grant new trials in the Superior Court, on proper and legal grounds, and it is only when the Judge of the Superior Court has, in granting or refusing a new trial, committed an error of law, that the jurisdiction of the Supreme Court arises.

An ordinary mind finds it difficult to discover an error of law in a judgment turning exclusively upon facts. Whether a certain amount of testimony does or does not, assuming the testimony all to be legal, establish a certain fact, would seem to have none of the elements of a legal question in it. But as the Judge is expressly authorized to grant new trials, on proper and legal grounds, it has been the uniform ruling that whilst this Court has no power over the verdict of a jury directly, yet, if a Judge refuse a new trial, when proper and legal grounds exist, or grant one when proper and legal grounds do not exist, he has committed an error of law. Our Code, section 3662, as one of the legal and proper grounds for granting a new trial, says, in any case, where the verdict of a special jury is found “contrary to evidence and the principles of justice and equity,” the presiding Judge *may* grant a new trial before another special jury. And again: Section 3667—“The presiding Judge may *exercise a sound dis-*

cretion in granting or refusing new trials, in cases where the verdict may be decidedly and strongly against the weight of evidence, although there may appear to be some slight evidence in favor of the finding."

The result of both these sections is that if a verdict be contrary to the testimony and principles of equity and justice, the presiding Judge *may* grant a new trial. But in doing this or in refusing to do it, he exercises a sound discretion. His own judgment upon the facts is to be exercised. He has seen the parties, the witnesses, and the jury. He is one of the community—the vicinage—and he has in his breast the unwritten and unwritable history of the case, and standing, as he does, a sworn judicial officer, accustomed from his habits of life and his legal knowledge, to estimate the value of evidence—to judge of the credibility of witnesses, and to ascertain the principles of equity and justice, the law casts upon him a discretion to grant or refuse a new trial in cases where the verdict is contrary to evidence and the principles of equity and justice. And when a bill of exceptions comes here assigning error on the judgment of a Judge, in granting or refusing a new trial, it is not only the verdict of the jury that is to be reversed, but the discretion of the Judge. And the real question before us is, has the Judge *abused* his discretion? Has he shown a want of that fair, equal, calm consideration which the judgment of an officer so placed and so confided in should exhibit?

We wish to impress on the minds of the Judges that in all such cases we will take it for granted that they have *exercised* the discretion cast upon them, and that they have not, as is sometimes in argument stated by counsel here, decided without consideration, intending to cast the responsibility on this Court. We have none of this discretion cast by law on the Judge of the Superior Court, and we cannot interfere unless the case be one where the verdict is of such a character, under the evidence, that the judgment of the Judge in reference to it displays a want of that sound sense and judicial discretion properly and necessarily belonging to his high position.

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We say this because we fear some of our Judges do not feel, as they ought, the responsibility cast upon them in this respect, and that they are too apt to pass hurriedly and carelessly on these motions, thinking that if they are wrong the bill of exception will secure a correction of the error.

With this view of the powers of this Court over the verdict of a jury, on the facts alone, we cannot bring ourselves to the conclusion that the present record presents a case for our interference. By the verdict of the jury the defendant did this horrid deed, and the Judge, in the exercise of his discretion, has set his seal to the verdict.

It is not with us a simple question of whether, in our judgment, he be the man or not. The question for us is, does the record present such a want of evidence as to authorize us to say not only that the jury have found a verdict against the weight of testimony, but that the Judge has abused his discretion in letting it stand. We do not think so. There is a great deal of evidence to sustain the verdict. It is, indeed, very difficult, nay, almost impossible, to conceive of so many indications of guilt, all pointing to this man, and yet he be innocent. God alone knows the secrets of the human heart. Society must judge and act on such rules as are necessary for its preservation. True, this evidence is circumstantial wholly, but the circumstances pointing to the guilt of Kelly are numerous. The jury have judged of the credibility of the witnesses, passed upon the plea of an *alibi*, and under their oaths have said they have no reasonable doubt of his guilt. It is not for us, under the facts set forth in the record, to say that the verdict shall be set aside as illegal, shocking to the moral sense, and displaying prejudice or mistake. We think an honest, fair-minded, intelligent jury might conscientiously come to the very conclusion this jury have done, and so thinking, we affirm the judgment of the Court.

By virtue, however, of the power granted us in section 4219 of the Revised Code, we shall direct that, after our judgment is made the judgment of the Court below, the prisoner be resented, the presiding Judge acting on the case according to

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the discretion vested in him in cases of circumstantial evidence, and passing upon him sentence of death, or of imprisonment for life, accordingly as in his judgment the nature of the case, the public interests, the rights of humanity, and the liability of all men to be mistaken, may demand.

Judgment affirmed.

DANIEL R. MITCHELL *et al.*, plaintiffs in error, vs. The MAYOR AND CITY COUNCIL OF ROME, defendant in error.

1. The principle that the owner of a building erected on the line of his lot, may, by lapse of time, acquire a prescriptive right to the lateral support of the adjacent soil, does not exist in this State, especially against a public or municipal corporation.
2. If the work of grading a street, such as digging below the foundation of a wall, or under a wall and underpinning the same, be done by the consent or direction of one of the joint owners of such wall, neither of the owners can recover damages from the City Council by whose laborers the work was done, on account of the falling of the wall being caused by such work.
3. Where it was a question at issue whether such consent or direction was thus given, it was error in the Court to charge the jury as follows: "What they (the City Council) do, so far out of the line of their own business as to be evidently done in the execution of somebody else's job, if such owner was present and knew what was going on and made no objection, will be presumed to be done by consent or direction of such property owner, if nothing appears to the contrary. But this presumption may be rebutted by any sufficient facts or circumstances, such as that the owner of the property protested against it," etc. The jury had the exclusive right in this case to determine what presumption arose from the facts proven by the evidence.

Prescription. Land. Municipal corporation. Streets. Joint tenants. Charge of Court. Presumptions. Before Judge HARVEY. Floyd Superior Court. July Term, 1872.

Daniel R. Mitchell and Jesse Lamberth brought trespass against the Mayor and City Council of Rome for \$2,000 00 damages, alleged to have been sustained by them from the cutting down and grading by the defendant of Etowah street,

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below the foundation of the wall of their house, in the city of Rome, known as the "Buena Vista Hotel," causing the said wall to fall, and thereby throwing down the ell of said building.

The defendant pleaded the general issue. The evidence made substantially the following case:

The original building, called the "Buena Vista Hotel," was built by Francis Burke, in 1836 and 1837, upon the *line* of the lots, at the corner of Broad and Etowah streets—the basement then being five or six feet below the surface of the ground; it fronted on Broad street some fifty feet, and on Etowah street thirty-five or forty feet. The ell that fell was two stories high and about fifty-five feet long, fronting on Etowah street; was built in 1847, by J. J. Printup, and built on *line* of lot and street. The end of the ell is up to the old building, but the walls of the ell were not let into—not tied into—the old building; there being but a cross wall fifteen feet from the old building for the purpose of tying the long walls of the ell together. About the year 1850, Broad street was cut down and graded by the city authorities some six or eight feet, to the base or below the foundation of the said building. Some grading was also done at this time on Etowah street, but not so low as the foundation of the ell. From this time (1850) some *three* or *four* instances of digging occurred up to the last in August, 1868, mainly on Etowah street. The wall of the ell fell on the night of the 13th of August, 1868. When the street hands were about to proceed below the foundation of said ell with their excavating, Mitchell protested, as he was fearful it would fall. He was assured by those in charge of the work and the chairman of the street committee that there was no danger, that as they went down they would make it perfectly safe by underpinning. He apprehended no danger until two or three years before the house fell; when, chancing to look at the wall, he discovered that it had leaned several inches towards Etowah street. He called the attention of several of the corporate officers to this, and especially that of Mr. Perry, the chairman of the street com-

mittee. He could never understand what was the matter until after the ell fell. He had seen the street hands digging under the wall and filling in with brick, and supposed they were placing brick the entire width of the wall. After the wall fell, he discovered that the dirt had only been dug out nine or ten inches, and that the weight of the whole wall had been standing on a nine inch wall, which extended only about four feet below the foundation of the ell, for several years.

This excavation and underpinning took place some time before Lamberth had any interest in the property, and at the time he purchased a half interest, in the fall of 1867 or spring of 1868, the wall was bowed out three or four inches. The street hands were at work on the day preceding the night when the ell fell. In August, 1868, the defendant had dug eight or ten inches below the foundation of the old building, and refused to underpin it. Plaintiffs hired hands to accomplish this end. They had been engaged at this work, under the superintendence of Lamberth, for several days before the wall fell. The job was finished on the evening before. The foundation of the ell was eighteen inches.

Considerable evidence was introduced on behalf of defendant, tending to show that the excavation beneath the wall, on the evening before it fell, was done under the direction and control of Lamberth, and that the agents of defendant were careful not to undermine said wall. This was denied by plaintiffs.

The evidence was also conflicting as to whether Lamberth, as a member of the City Council, had not moved to table the claim for damages when presented to that body for payment.

The jury returned a verdict for the defendant. Whereupon, the plaintiffs moved for a new trial upon the following grounds, to-wit :

1st. Because the verdict is contrary to the law and the evidence.

2d. Because the Court erred in charging the jury as follows: "The Mayor and City Council of Rome may grade down the street whenever, in their judgment, the public in-

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terest requires, and go even to the line of the street, but they must do their work in a skillful and careful manner, so as to not unnecessarily endanger the property of contiguous land owners, and when the work they propose to do would probably endanger the property of such land owners, they must give the owner reasonable notice, so that he may take timely steps to secure his property, unless the facts show the contiguous property owners to have full and timely knowledge of their intended work, without formal notice. If all these precautions and conditions are observed, the city authorities are not liable to the owners of adjacent walls if they do fall, in consequence of digging down the streets; but if the damage is for want of an observance of these precautions and conditions, they are liable."

3d. Because the Court erred in charging the jury as follows: "What they (the City Council) do which appears to have been done in executing, or aiming to execute, their own business, it will be presumed to be done under order from the corporate authorities; what they do so far out of the line of their own business as to be evidently done in the execution of somebody else's job, if such owner was present and knew what was going on, and made no objection, will be presumed to be done by consent or direction of such property owner, if nothing appears to the contrary, but this presumption may be rebutted by any sufficient facts or circumstances, such as that the owner of the property protested against it," etc.

4th. Because the Court erred in charging the jury as follows: "If the digging was done or any undermining attempted, or done under the plaintiffs' wall, who did it? The street hands or other persons employed by plaintiffs. If the street hands did it, by whose direction or what authority? If they did it without any other direction or authority than such as they received from the city authorities, the defendant is liable for any damage occasioned by it, but if they did it by any direction or authority of the plaintiffs, then the plaintiffs must bear the loss."

5th. Because the Court erred in charging the jury as fol-

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lows: "The plaintiffs had the right to insist that the city employees should perform skillfully and carefully what the city authorities undertook to do, but they had no right to insist that such employees should do anything that belonged to the plaintiffs to do, and if you believe, from the evidence, that there was any interference of this sort by the plaintiffs with the employees of the City Council, and that at the instance and with the knowledge of the plaintiffs, without the consent or direction of the city authorities, the city employees were induced to dig under or underpin the plaintiff's wall, and the damage ensued therefrom, then the City Council would not be liable."

6th. Because the principal of law of *damnum absque injuria* did not apply to this case, as the evidence proved that the ell had been built more than twenty years, and the owners, by prescription, had the right to the support of their wall by the adjacent earth, and the city authorities had no right to dig it away for any public purpose.

The motion was overruled, and the plaintiffs excepted upon each of the aforesaid grounds.

UNDERWOOD & ROWELL; D. R. MITCHELL, for plaintiffs in error.

HAMILTON YANCEY, for defendant.

Damnum absque injuria: 27 L. J. (N. S.) Q. B., 388. Power of corporation over streets: 28 Ga., R. 46; 23 *Ibid.*, 404; 34 *Ibid.*, 326; 6 Wheat, 597; Dillon on Mun. Corp., sections 524, 542; 1 Hill, 545; 33 Penn., 180; 6 W. and S., 101; 9 W. and S., 9; 6 Harris, 65; 14 S. and R., 71; 6 Wheat, 45; 14 How., 80; 1 Penn., 467; Sher. & Red on Neg., 164; Angel on High., 236. Grigg vs. Foote, 4 Allen, Mass., 195; Brown vs. Lowell, 8 Met., *Ibid.*, 172; Benjamin vs. Wheeler, 8 Grey, *Ibid.*, 409. Radcliff vs. Mayor, etc., 4 Comst., N. Y., 195; Wilson vs. Mayor, etc., 1 Denio, *Ibid.*, 595; Mills vs. Brooklyn, 32 *Ibid.*, 489. Green vs. Reading, 9 Watts, Penn., 382; O'Connor vs. Pittsburg, 18 *Ibid.*, 187. Hovey vs. Mayor,

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etc., 43 Me., 322. *Hooker vs. New Haven*, 14 Conn., 146. *Snyder vs. Rockport*, 6 Ind., (Port.,) 237. *Roberts vs. Chicago*, 26 Ill., 249; *Murphy vs. Chicago*, 29 *Ibid.*, 279; *Nevins vs. Peoria*, 41 *Ibid.*, 502. *Taylor vs. St. Louis*, 14 Mo., 20; *Hoffman vs. St. Louis*, 15 *Ibid.*, 651; *St. Louis vs. Gurno*, 12 *Ibid.*, 414. *Humes vs. Mayor, etc.*, 1 Humph., Tenn., 403. *White vs. Yazoo City*, 27 Miss., 327. *Reynolds vs. Shreveport*, 13 La., Ann, 426. So in the United States Courts: *Goszler vs. Georgetown*, 6 Wheat, 593; *Smith vs. Washington*, 20 How., 135.

The defendants, in grading its streets, are bound only to furnish sufficient skill for the proper execution of its duties; they act in a public capacity, and, like other public agents, are not liable for the trespasses of its employees, done outside of their employment: *Martin vs. Mayor, etc.*, 1 Hill, 550; *Bailey vs. Mayor, etc.*, 3 Hill, 531; *Harris vs. Baker*, 4 M. and Selw., 27; *Hall vs. Smith*, 2 Bing., 156; *Plate Glass Company vs. Meredith*, 4 T. R., 794.

Doctrine of prescriptive right. In *Wyatt vs. Harrison*, 3 Barn. and Ad., 871, the Court say: "If I have laid an additional weight upon my land, it does not follow that one is to be deprived of the right of digging in his own ground because mine will thus become incapable of supporting the artificial weight which I have laid upon it."

"No man, by the mere prior enjoyment of the advantages of his own land, can establish a servitude upon the land of another:" *Wheateley vs. Baugh*, 25 Penn. St., 528. Also, in *Radcliff vs. Mayor, etc.*, 4 Comst., 195, where the cases are collected and the principle examined with marked ability: *Foley vs. Wyeth*, 2 Allen, 131; *Thurston vs. Hancock*, 12 Mass., 220; *Lasalla vs. Holbrock*, 4 Paige, 169.

Says Baron Alderson, in *Partridge vs. Scott*, 3 M. & W., 220: "Rights of this sort, if they can be established at all, must have their origin in grant." But as well said by a writer in the *American Law Review*, 1 volume, 10—"How can the assent of the adjoining proprietor be implied when he never had an opportunity to express his dissent? He could

bring no action against his neighbor for doing what he had a perfect right to do. It is a mockery to say that he might have dug up his land during the period of prescription. The doctrine has been very much shaken in England since the recent case of Solomon *vs.* Vinters Co., 4 H. and N., 585." Lord Ellenborough, in Stansell *vs.* Jollard, 1 Selw., N. P., 444, put the decision of the Court "upon analogy to the rule as to lights, etc., that he acquired a right to support."

"The analogous doctrine of lights has been so generally discarded in this country, that we are disposed to believe that the prescriptive right of support to houses will be also rejected, when fairly presented for decision:" Parker *vs.* Foote, 19 Wend, 309, New York; Myers *vs.* Gemmel, 10 Barb., 537; Richardson *vs.* Pound, 15 Gray, 387, Mass.; Paine *vs.* Boston, 4 Allen, 169; Napier *vs.* Bulwinkle, 5 Rich., 311, So. Ca.; Pierre *vs.* Fernald, 26 Me., 436; Cherry *vs.* Stein, 11 Md., 124; Ward *vs.* Neal, 37 Ala., 501; Haverstick *vs.* Sipe, 33 Penn. St., 368; Ingraham *vs.* Hutchinson, 2 Conn., 584.

In Richart *vs.* Scott, 7 Watts, 460, the Court repudiated the doctrine, though claimed under the prescriptive right of twenty-one years' use.

The authorities of the city of Rome cannot sell a street, or any part of a street. Albany and Gulf Railroad Company *vs.* Patrick K. Shields *et al.*, 33 Ga., 611; Mayor, etc., of Columbus *vs.* Jaques, 30 Ga., 506; State *vs.* Mayor, etc., Mobile, 5 Porter, 279; 3 vol. Amer. Law Times, 7. Hence, *pari ratione*, the city of Rome cannot grant an easement in its streets inconsistent with the uses and requirements of the public.

TRIPPE, Judge.

1. The ancient doctrine of title by prescription which depended on immemorial usage, has given way to the modern rule of presuming a right by grant or license to easements and incorporeal hereditaments, after twenty years of uninterrupted adverse enjoyment. To authorize the presumption, the enjoyment must not only be uninterrupted for the space

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of twenty years, but it must be adverse and under a claim or assertion of right, and not by the consent or favor of another claimant or true owner: 2 Pick., 466; 11 East, 372; 4 B. & Ald., 579. The fact that the *user* must be adverse, must exist in every such case, to authorize the necessary presumption. If the use of the easement be, *ab initio*, legal or rightful, the title of the occupant is as good at the outset as it could be by the lapse of any length of time, and there is no necessity of any presumption. But if it be the usurpation of the property of another under a claim of right, it then becomes adverse, for it is in hostility to the title and in derogation of the rights of the original owner—an actual ouster of him. In such cases a grant, or license, or covenant, is presumed for the purpose of quieting the enjoyment or possession thus adversely held or used. The injured party, who may for such a long time sleep over his rights, cannot complain of this rule. He could have had redress any day during the twenty years by action, and could have arrested by suit, at any time within that period, the continued and uninterrupted possession or enjoyment. His remedy was in his own hands. This right of the injured party is a cardinal fact that must exist, else all statutes of limitation, and all rules of prescription or of presumption, of license or grant, would be but rules of spoliation or robbery. And thus exist those provisions which suspend the running of the rules of limitation against the rights of any one laboring under disabilities to assert his claim by action.

Statutes of limitation apply to cases where one is in adverse *possession* of property that may be claimed by another, and if the statutory period elapses before a counter-claim is asserted by action, the right or title of the one in possession is held legal and perfect. The doctrine of presuming a right, by grant or otherwise, to easements, etc., exists where one is in the adverse use or enjoyment for a certain period of an incorporeal right. This use or enjoyment cannot be adverse unless it be exercised in denial of the title and in derogation of the rights of any other owner. It cannot be adverse to another owner unless he has a right of action on account of a wrong

done him. The damages may be but nominal, but if his right has been invaded, and there be danger that by lapse of time he may be barred from denying the claim of his adversary, he can, by a judgment, establish his title and forever determine the question of presumption of a grant. At any rate, he has the means of self-protection.

This rule, then, of presumption of right, by grant or otherwise, may well apply to claims which relate to *commons, markets, water-courses, ways*, and the like, where an adverse user or enjoyment is a direct and overt injury to the person who may be the true owner, and against whom the presumption is to be made. In all these instances there is an invasion on the property of another, or his beneficial interest in it is lessened. The wrong done may be redressed by immediate action. During all the time, which, by its lapse may raise the presumption against him, he has it in his power to arrest that presumption by asserting his right and having it settled by a judgment. But it is difficult, if not impossible, to see how this doctrine can be made to apply to those instances of easements, so called, where there is no possession of anything belonging to another, no encroachment upon another's right, no adverse user, in fact, nothing done whatever, against which another could complain, or for which an action could be brought, and no remedy existing whereby to prevent such a presumption from arising. If it does so apply, a person would be compelled to submit to the loss or depreciation of important rights, or to a damaging interest accruing to another by mere lapse of time, and be utterly powerless to prevent it, save, perhaps, by some churlish or expensive appropriation of his property to uses or purposes hurtful to himself and offensive to his neighbor. Thus, for instance: if this doctrine exists in the case of lights or windows overlooking the premises of an adjoining proprietor, simply because they have been used for twenty years, (and after that time no building can be erected to interfere with such lights,) then as such proprietor of the adjacent land has no right of action, no claim for damages for a wrong done, he will be forced to build at the dicta-

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tion of another, or to set up an obstructing wall, merely to show he is lord of his own soil, or forever lose the right of the free use of his property. A servitude on his land might become fixed, simply because he might not be prepared to build within a given time.

It is true this doctrine of acquiring a presumptive right to light and air by mere length of enjoyment, has been held for many years in England, and in a few of the States of the Union. But in most of the States it has been decided not to have been the doctrine of the ancient common law, is not the law of this country, and is not suited to the condition of a country which is growing and changing so rapidly in all its relations of property, as well as its value and modes of enjoyment: 19 Wend., 309; 10 Barb., 537; 15 Gray, 387; 33 Pa. St. R., 368; 37 Ala., 501; 5 Rich., 311; 2 Conn., 584; 26 Me., 436; 11 Md., 1; Wash on Easements, 498; Cooley's Blackstone, 2 book, 36 (note 20.) In *Parker vs. Foote*, 19 Wendell, it is styled "the modern English doctrine," "an anomaly in the law," "a departure from the old law." It is further said, "it may do well enough in England, * * but it cannot be applied to the growing cities and villages of this country without working the most mischievous consequences: 3 Kent's Com., 446, (note a.)

The decisions thus far referred to were cases involving the question of a prescriptive right, from long enjoyment, to light and air. But every principle or reason advanced in support of them applies with full force to a claim of right by the owner of a building erected on the line of his lot to the lateral support of the adjacent soil, on the ground that his building has been standing there for a given number of years. Neither in the case of the window opening out on another man's land, or of a building erected on the dividing line, has the owner committed an act against which his neighbor can protest. He has not touched his property, or invaded any right, or given any cause of action. He had a right to use or build on his lot to the farthest limit of his boundary. He has only done this, and never has had any use, or possession, or enjoyment

of any right, corporeal or incorporeal, belonging to another, to which objection could in any form be made, and "it would, therefore, be a misuse, as well as an abuse, of the terms *license, grant and acquiescence*, to say he has acquired a right by means thereof from the owner of the adjacent lot. This was so expressly decided in *Hoy vs. Sterrett*, 2 Watts, 227; *Richart vs. Scott*, *Ibid.*, 460. The grounds upon which these decisions are put are precisely the same as those in the cases applicable to lights and air. As has been well said by a writer in the *American Law Review*, 1 volume, 10—"How can the assent of the adjoining proprietor be implied when he never had the opportunity of expressing his dissent? He could bring no action against his neighbor for doing what he had a perfect right to do. It is a mockery to say he might have dug up his land during the period of prescription. The doctrine has been very much shaken in England since the recent case of *Solomon vs. Vinters Company*, 4 H. & N., 585;" and adds further, "the analogous doctrine of lights has been so generally discarded in this country that we are disposed to believe that the prescriptive right of support to houses will be also rejected when fairly presented for decision."

As was said of the doctrine of a prescriptive right to lights, already quoted, so it may be said of this, as claimed by plaintiff in error, "it cannot be applied to the growing cities and towns of this country without working the most mischievous consequences." In *Mayor and Council of Rome vs. Omberg*, Judge LUMPKIN said: "People purchase property and build in towns with full knowledge of the public necessity to have streets by excavating or elevating as the case may demand; and they must take the chances and consequences." I conclude on this point with the words of our young brother who ably argued it for defendant in error. "One building on his own land is clearly in the exercise of his legal rights. There is *no encroachment* upon the land or rights of another; *no occupation* of that which belongs to another; *no adverse possession* under a claim of title. No one can have a right of action against him, for he has not trespassed upon or vio-

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lated the rights of any other person. How then, can he, by this lawful use of his own land for twenty years, acquire a beneficial interest in the land of his neighbor?"

2. We do not think there was any liability on the part of the city for any work that might have been done by the direction or consent of either of the plaintiffs. They were tenants in common, and were in joint possession, and are joint plaintiffs. If one had confederated with third parties to have committed willful damage or trespass, the question might be different. But if it be proven that work is done upon the common property by the approval or direction, of a joint owner in possession, there is no liability on the one who does the work simply for executing the directions of his employer.

3. But where it was a question in issue whether such consent or direction was given, we think the Court went too far in charging the jury, "what they (the City Council) do so far out of the line of their own business *as to be evidently done in the execution of somebody else's job*, if such owner was present and knew what was going on, and made no objection, will be presumed to be done by direction or consent of such property owner, if nothing appears to the contrary. But such presumption may be rebutted," etc. In the first place, the charge assumes that what was done, of which complaint is made and for which suit is brought, was evidently *somebody else's job*—to-wit: that somebody, other than the City Council had it done. That was a disputed fact, and one for the jury exclusively. Secondly, section 3699 of the Code, says presumptions of fact are exclusively questions for the jury. We think it was the right of the jury in this case to determine what presumption arose from the facts proven by the evidence, and for this reason remand the case for a new trial: See *Macon and Western Railroad vs. McConnell*, 27 Ga., 482.

New trial granted.

MARY E. SHORTER, plaintiff in error, vs. WILLIAM B. MARSHALL, defendant in error.

(TRIPPE, Judge, was providentially prevented from presiding in this case.)

1. When answers to interrogatories were taken, by consent, without a commission, the execution and return of the interrogatories were not controlled by the provisions of the statute regulating the issuing and return of commissions.
2. The interrogatory, "Please state whether or not you have, from year to year, given in and paid all legal taxes chargeable by law on the debt which is the foundation of this suit?" is not so leading, under the previous rulings of this Court, as to be excluded on exception taken.
3. When a number of questions are asked in a single cross-interrogatory, this Court will not scan the answers as closely as if each was a separate interrogatory. If the whole answer taken together, is a substantial reply to the whole interrogatory, it will be held to be sufficiently full, though each question is not separately answered.
4. When an account became due on the December 20th, 1860, and suit was brought thereon on March 1st, 1869, the claim is not barred by the statute of limitations.
5. It is for the jury to determine what credit shall be given to the evidence of an impeached witness.
6. Where the verdict of the jury did substantial justice, and the Court below was satisfied with it, this Court will not disturb their finding.

New trial. Interrogatories. Statute of limitations. Witness. Before Judge JOHNSON. Muscogee Superior Court. May Term, 1872.

William B. Marshall brought complaint against George Hargraves, administrator, and Mary E. Shorter, administratrix, upon the estate of James H. Shorter, deceased, on an open account for \$100 00, for one fifty-saw gin. The declaration was filed in office on March 1st, 1869. By an amendment, the plaintiff struck the name of "George Hargraves, administrator," and also the term "administratrix," following the name of Mary E. Shorter, from the declaration, leaving the suit to proceed against the latter individually. The defendant pleaded the general issue and the statute of limitations.

Upon the trial the defendant excepted to the third direct interrogatory, in the first set propounded to the plaintiff, upon

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the ground that it was leading, and because he was asked to state his custom in selling gins. The question and answer referred to were as follows :

“ Upon whose order, or by whose direction was the gin furnished ? State where and when the gin was delivered, and who was the overseer on the plantation at the time of its delivery ? State your custom in the selling of gins at that time, in reference to the payment therefor, and when the money for the gin was due ? State who received the benefit from the use of the aforesaid gin ? ”

A. “ Westley Towns came to me and said that the defendants had got him to order a gin from me for them. In the summer of 1859, I delivered the gin under the order mentioned, at the plantation of the estate represented by the defendants, in Russell county, Alabama, some seven or eight miles this side of Hurtville. My custom in selling gins at that time was two dollars a saw. As my books are not here, I do not remember when it was due, but I usually sold on one year's time, but think it was due on December 25th, 1860. Defendants, as representatives of the estate, received the use and benefit of the gin.”

The exception was overruled, and the defendant excepted.

On the second set of interrogatories propounded to the plaintiff was a waiver of defendant's counsel of “ notice, commission and all further service.” The defendant excepted to this entire set, because J. L. Oneal, whose name appears with James T. Willis, commissioner, does not sign officially as commissioner, because the place of execution does not appear, and because there is no seal attached to the name of Willis or Oneal. The exceptions were overruled, and the defendant excepted.

The defendant excepted to the third direct interrogatory in said set, because illegal and leading. The question and answer referred to were as follows :

“ Please state whether you have or not, from year to year, given in and paid all legal taxes chargeable by law on the debt which is the foundation of this suit ? State fully ? ”

A. "I have paid all taxes required by law of me on said debt since it was contracted up to the present time."

The exception was overruled, and the defendant excepted.

The defendant further excepted to said set of interrogatories, upon the ground that each question contained in the first cross-interrogatory was not fully answered. The interrogatory and answer referred to are as follows :

"What amount did you value the account in question at each year since it was made? To whom did you give in your taxes each year for said account? To whom did you pay taxes each and every year on said account? Attach your tax receipts for each and every year. If you state that any or all of your tax receipts are lost or mislaid, state whether, after diligent search, you can find them? If not, state their contents? Did you give this account in with all other personal property, accounts and notes? Did you estimate the value of all your accounts and notes together, or this one by itself? How many accounts and notes did you give in each year with this? Did you give them all in for their face valuation, including interest added, each and every year since the debt was contracted? If not, what accounts and notes did you give in for each year since the debt was contracted? What amount did you give in each account and note at? Why was this account an exception to other accounts and notes? In what currency did you pay your taxes for this account each and ever year?

A. "I gave it in at its face, interest added. I gave it in to the tax receiver, but do not recollect who was the tax receiver each year. Paid the collector, but do not recollect who was the collector each year. Don't recollect where all my tax receipts are; can't find them, and don't recollect their contents. I gave in this account with all my other notes and accounts, but always considered it good, and therefore gave it in for its full amount. Don't recollect how many other notes and accounts I gave in each year, but if my attention was directed to any particular one I could tell whether I gave it in. I gave in all that I considered good at their face, interest added. Others that I

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considered doubtful I valued and gave in at what I considered them worth. Don't recollect what other notes and accounts I gave in at their full amount. The reason this account was an exception, was because I always considered the defendants abundantly able to pay it, and therefore felt bound by law to give it in for its full amount. Besides, I was sworn when I gave in my taxes, and, believing it to be good, I could not swear otherwise. Paid sometimes in bank bills, sometimes in Confederate currency, and sometimes in 'greenbacks,' always in the currency required of me."

The exception was overruled, and the defendant excepted.

The only evidence necessary to an understanding of the questions made is embraced in the decision.

The Court charged the jury as follows: "If the plaintiff delivered a gin to defendant, at her instance, she is liable to him for its value, and such is the case whether she was administratrix or not, unless stipulated to the contrary. If the gin was procured by an agent of the defendant, it is the same as if procured by herself. It is insisted that the plaintiff is barred of his claim by the statute of limitations. The Court charges that if the demand became due on December 25th, 1860, and suit was commenced as shown by the writ, then the plaintiff was not barred. (Each of these positions the Court explained at length and stated to them that it was for the jury to determine them from the testimony.)

"It is further contended that as two witnesses had sworn that they would not believe Towns, that the jury must discard the testimony of Towns. The Court charges you, that if Towns was shown to be unworthy of credit, you would not believe him and reject his testimony. But it is for you to determine from the whole evidence what credit should be given to him. The law does not require you to disbelieve him, because two witnesses said they would. If the truth required it, you might believe him against the two witnesses. You will determine the case by considering the whole evidence."

The jury returned a verdict for the plaintiff for \$100 00,

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with interest from December 25th, 1860. Whereupon, the defendant moved for a new trial upon the following grounds, to-wit:

1st. Because the Court erred in overruling the exceptions to each of the aforesaid sets of interrogatories.

2d. Because the Court erred in its charge to the jury in reference to the statute of limitations.

3d. Because the Court erred in its charge in reference to the credit of an impeached witness.

The motion was overruled, and the defendant excepted upon each of the aforesaid grounds.

JAMES M. RUSSELL, for plaintiff in error.

B. H. CAWFORD; M. J. CRAWFORD, for defendant.

Cross-interrogatories substantially answered sufficient: 14 Ga. R., 242; *Ibid.*, 277. Objections to execution and return waived, concludes party from objecting to depositions because cross-interrogatories are not fully answered: 32 Ga. R., 542. Number of questions asked in one cross-interrogatory, answer not scanned closely: 41 Ga. R., 117. Questions to be objectionable as leading must suggest the desired answer: 33 Ga. R., 275; 1 Starkie, 150. Place of execution need not be stated: 23 Ga. R., 132. Names of commissioners not inserted in commission, not sufficient to invalidate: 20 Ga. R., 198. Defendant cannot object to evidence of fact beneficial to him: 14 Ga. R., 277. Power of executor, or administrator to bind estate by contract: 8 Ga. R., 236; 11 Ga. R., 1. Statute of limitations: 38 Ga. R., 300; 41 Ga. R., 231. *Satterfield vs. Swab & Co.*, decided October 1st, 1872, not yet reported.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendant on an open amount for \$100 00, the price for a fifty-saw cotton gin. On the trial of the case the jury found a verdict for the plaintiff. A motion was made for a new trial on the several grounds set forth in the record, which was

overruled by the Court, and the defendant excepted. There was no error in overruling the objection to the execution of the interrogatories, inasmuch as the answers of the witness were, by consent, taken without a commission issued by the Court, and not having been taken under the statute regulating the issuing and return of commissions to take testimony, was not controlled by its provisions. According to the previous rulings of this Court, there was no error in overruling the objections to the answers of the witness Marshall, on the ground that the questions were not fully answered, or because some of the questions were too leading. Nor do we find any error in the charge of the Court in relation to the statute of limitations, or in regard to the impeachment of the witness Towns, in view of the evidence contained in the record, or in the refusal of the Court to charge as requested. There is no doubt from the evidence that the plaintiff sold the gin to the defendant, Mrs. Shorter, either in her individual capacity or as administratrix of Shorter, and that the same was used and nearly worn out by her in one capacity or the other. The only doubt arising from the evidence is whether she ordered and received the gin in her individual capacity, or as administratrix of Shorter's estate. That question was fairly submitted to the jury under the charge of the Court, as well as the question, whether, under the law, as given in charge, and the evidence, the plaintiff's demand was barred by the statute of limitations, and the jury found in favor of the plaintiff on both the questions submitted to them.

In our judgment, the verdict of the jury did substantial justice between the parties, and the Court below being satisfied with it, we will not disturb their finding.

Let the judgment of the Court below be affirmed.

MARTHA C. PHIPPS, plaintiff in error vs. JAMES H. MORROW, Ordinary, *et al.*, defendants in error.

Prima facie, an Ordinary of a county has no right to settle a debt due the county by a defaulting public officer, by taking land in payment of the debt, as the property of the county, and in a suit in the name of the Ordinary to recover the land, the burden is upon the Ordinary to show that it was necessary to take the land to save the debt, or that the land was taken for some specific public purpose for which the county authorities may buy land for the county. But if this be shown, as that it was necessary to save the debt, or the land was bought for such specific purpose, and under such circumstances as would give the Ordinary the right to buy, that makes out a case where the Ordinary may sustain the action, other proper title being shown.

County matters. Ordinary. Officer. Deed. Before Judge HOPKINS. Clayton Superior Court. September Term, 1872.

Martha C. Phipps filed her bill against James H. Morrow, as Ordinary of Clayton county, James R. Phipps and his wife, Mary Phipps, making, substantially, the following case:

Richard Phipps, the husband of the complainant, furnished a fund to the defendant, James R. Phipps, for the purpose of purchasing a home for complainant. James R. Phipps made the purchase, but took the title in his own name instead of in that of complainant, and afterwards conveyed the land to the defendant, Morrow, as Ordinary of Clayton county, his wife, Mary Phipps, signing the deed with him. Complainant prays that the deed made by James R. Phipps be set aside, that the land be delivered up to her, that the deed conveying the land to James R. Phipps be canceled, and that the title to the land be decreed to be in her.

The answer of Morrow, as Ordinary, alleges that James R. Phipps had been treasurer of Clayton county, and in the transaction of the duties of his office had become indebted to the county in the sum of \$1,700 00; that defendant assumed control of the indebtedness, and accepted in satisfaction thereof a deed to the land executed by the defendants, James R. Phipps and Mary Phipps; that thereby, there was vested in

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defendant, for the use of the county of Clayton, a valid title to said property.

The evidence made the case presented by the bill and answer. The charge of the Court is unnecessary to an understanding of the case, except as contained in the assignments of error. The jury returned a verdict for the defendants.

The complainant assigns error as follows :

1st. The Court erred in charging the jury, "that if Morrow was Ordinary of Clayton county, and James R. Phipps was indebted to Clayton county, Morrow, as Ordinary, had the right and power, under the law, to control that indebtedness and to agree to a settlement, and to accept a deed to the land in settlement of Phipps' indebtedness."

2d. The Court erred in charging the jury, "that if Morrow was Ordinary at the time, and that, in satisfaction of said indebtedness, (no matter when it arose) he received from James R. Phipps a title to the land in question, and without any notice, actual or constructive, of the claim of complainant to it, the land and its title in his hands would be protected from her claim, and the verdict should be for the defendant."

A. W. HAMMOND & SON ; W. WATERSON, for plaintiff in error.

JOHN L. DOYAL ; E. W. BECK ; SPEER & STEWART, for defendants.

McCAY, Judge.

Had the Ordinary of Clayton county the right under the facts set forth in this record, to purchase the land in dispute? It is settled in this State that the old Inferior Court, Ordinary, County Commissioners, etc., who have charge of county affairs, have no powers except those expressly granted, or such as arise by necessary implication from the powers actually granted: See *Dent vs. Cook*, 45 *Georgia*, 325. There is no pretense that there is any grant of a general power to an Ordinary to buy land, or that there is any necessary implication

of such a power from the powers granted. All that can, with any show of reason, be contended for, is that there are purposes and circumstances, in and for which, this power may very fairly be implied. And this is doubtless true. The county needs land, say for a jail, Court-house, and other public buildings; and there is special provisions authorizing the purchase of land for a poor-farm. But this is a very different thing from the general rights of an Ordinary to purchase and hold such land for the county, as he may see fit. We do not think he has any such power, and we think the cases we have referred to establish it. We are inclined, too, to think that perhaps, an Ordinary might, if it were *necessary* for the collection of a debt due the county, take land for the debt, instead of money. But this would be a very dangerous power, and if exercised, it should be only under circumstances where the necessity was obvious: See 16 Sergeant & Rawle's Reports, 592. The Ordinary is a mere *public agent*. He is not the public. It often happens that these officers are neither wise nor unselfish men, and we think the laws very wisely require them to keep, at all times, in their exercise of power, within the very limits of the grant.

There is nothing in this record to show that this land was bought for any of the purposes for which land is, by law, specially authorized to be bought. Nor do the facts show that it was *necessary* to buy this land to save the debt due from the old treasurer. It does not appear that he did not have a good bond and good security. So far as it appears, this purchase may have been a mere favor, either to the treasurer himself or his securities. Such a power we do not think exists by law in the Ordinary, and it would be very detrimental to the public interest if it did.

The only question there is at all in this case, upon which there arises any doubt in our minds, is, upon whom the burden of proof lies in cases like this. Must the Ordinary show his authority, or must the party denying it show the want of authority? The general rule, in the case of corporations and public agents, undoubtedly is that their power to act must al-

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ways affirmatively appear. They are only what the grant makes them. That is the law of their being, and they can exercise only such functions as they are by law authorized to exercise.

An Ordinary in this State stands even upon a more limited footing than this. He is not the county. He is a mere agent of the county. He has certain definite, specific powers as a public officer, and he has no others. In all his acts it ought to appear that he is acting within the scope of his powers, because it is only when he is doing a public duty, cast upon him by law, that his authority to act at all exists. It is always in his power to show the circumstances surrounding his acts. As in this case, if this land was needed for any of the county purposes, or if it was *necessary* to take it to save a debt due the county, it is in his power to show it.

We are the more ready to keep Ordinaries and public officers of the like character within this strict rule, because, by our present laws, county affairs are in the hands, generally, of one man, and the whole genius of our county organization makes it almost a public necessity that these officers shall confine themselves strictly within the limits of their express powers, or of such necessary implications as are required for the use of their expressly granted powers.

Judgment reversed.

WILLIAM P. CRAWFORD AND SAMUEL W. MAY, executors,
plaintiffs in error, vs. SARAH E. WARD, defendant in error.

1. On the trial of an appeal from the judgment of the Ordinary allowing two lots of land, by their numbers and district, as a homestead, the proceedings showing the number of acres, and the issue is, whether the homestead set apart by the Ordinary is not in value greater than \$2,000 00 in specie, and, in the evidence, the value is given by the witnesses at certain rates per acre—the jury may find by their verdict in favor of the homestead as allowed by the Ordinary, if they believe, from the testimony, it does not exceed in value the constitutional limit. And if from the evidence they believe it does exceed in value

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said limit, they may reduce the number of acres, and specify how much and what part of the land shall be allowed as a homestead, so that the same shall not be of greater value than \$2,000 00 on a specie valuation.

2. The verdict in this case is not so strongly and decidedly against the weight of the evidence in reference to the value as to authorize it to be set aside, when the question was fully and distinctly submitted by the Court to the jury.

New trial. Homestead. Before Judge HARRELL. Randolph Superior Court. May Term, 1872.

Sarah E. Ward, wife of Andrew J. Ward, petitioned the Ordinary of Randolph county to have a homestead set apart for herself and her minor children, in lots of land numbers eleven, twelve and thirteen, in the ninth district of said county. Said tract contained, according to the return of the county surveyor, six hundred and seven and one-half acres. Two of the commissioners appointed to value said land estimated it as worth five dollars in specie per acre, the third dissenting. George W. Crawford, a creditor of Andrew J. Ward, objected to the valuation. After hearing the evidence and argument, the Ordinary set apart lots numbers eleven and twelve, with the improvements thereon, as a homestead for the petitioner. George W. Crawford carried the case by appeal to the Superior Court. The jury, by their verdict, sustained the judgment of the Ordinary.

George W. Crawford moved for a new trial upon the following grounds, to-wit :

1st. Because the Court erred in refusing to charge as requested, "that the jury should find for or against the homestead set apart by the Ordinary," and in charging "that they should find, according to the evidence, a homestead for the applicant not exceeding in value \$2,000 00 in specie; that if the evidence would warrant it, they might find the six hundred acres embraced in the application and first set apart by the surveyor; or, that they could find the four hundred acres to which it was reduced by the commissioners and as set apart by the Ordinary, or a less number of acres if they believed

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from the evidence that the four hundred acres was worth more than \$2,000 00 in specie; that it was their duty to set apart a homestead of \$2,000 00 in specie value out of these lands, and must find the amount of land she was entitled to from the evidence."

2d. Because the verdict is contrary to the principles of equity and justice.

3d. Because the verdict is strongly and decidedly against the weight of evidence.

The evidence was conflicting as to the value of the land, irrespective of the improvements. Different witnesses estimated it as being worth different prices, varying from three dollars to eight dollars in gold per acre. The cost of the improvements was estimated at from \$4,000 00 to \$5,000 00. All the testimony showed that the place is well improved.

The new trial was refused, and George W. Crawford excepted upon each of the aforesaid grounds.

The death of George W. Crawford was suggested in the Supreme Court, and his executors were made parties in his stead.

E. L. DOUGLASS; H. FIELDER, for plaintiffs in error.

HOOD & KIDDOO; C. B. WOOTEN, for defendant.

TRIPPE, Judge.

Sarah E. Ward filed her application to the Ordinary of Randolph county for a homestead. The surveyor returned, as surveyed by him with a plat, three lots of land, by numbers eleven, twelve and thirteen, each containing two hundred two and a half acres. George W. Crawford (then in life) as a creditor, filed his objection that the land was of greater value than \$2,000 00 in specie. Commissioners were appointed, who reported the land to be worth five dollars per acre. The Ordinary, on this report, allowed two of the lots on which were the improvements, as a homestead, and passed an order accordingly. From this the objecting creditor appealed.

On the trial, evidence was introduced by both parties as to the value of the land, and of the improvements, and of the land as affected by the improvements. The witnesses differed greatly in their estimates of the value, varying from three to eight dollars per acre.

The Court was requested by counsel for objecting creditor to charge the jury, that "it was the duty of the jury to find either for or against the homestead, as allowed by the Ordinary," which the Court refused, and charged "that they should find according to the evidence a homestead not exceeding \$2,000 00 in specie, that they could find the four hundred acres set apart by the Ordinary, or for a less number of acres, if they believed from the evidence that the four hundred acres were worth more than \$2,000 00 in specie; that it was the duty of the jury to set apart a homestead of \$2,000 00 in specie value out of this land, and they must find the amount of land she was entitled to from the evidence." The refusal of the Court to charge as requested, and the charge as given, are complained of.

1. The decision in *Kirtland et al., vs. Davis*, 43 *Georgia Reports*, we think settles this question. An appeal carries up the case so that it may be heard *de novo*, and the appellate Court has the powers of the Ordinary, on the trial of the appeal. The jury may find as they were instructed by the Court they could do, and if the evidence was such that they could not define by metes and bounds, or by proper descriptions, the portion of land they might find as a homestead, provided they found less than the Ordinary allowed, they could so frame their verdict as to authorize the Court to have the proper order to issue to the surveyor to survey the land and make and return such a plat as might be required by the terms of the verdict.

2. We do not think that the weight of the evidence was so strongly against the verdict as to authorize a new trial on that ground. The question of the value was distinctly and fully submitted to the jury.

Judgment affirmed.

Helms *et al.* vs. Whigham.

GEORGE W. HELMS *et al.*, plaintiffs in error, vs. JAMES S. WHIGHAM, guardian, defendant in error.

Where the evidence showed that the note sued on was turned over to the plaintiff, as guardian for the children of Hickey, and that they were all of age except the youngest, it was lawful for the plaintiffs to have a judgment against the defendants without proof of the payment of taxes.

Relief Act of 1870. Minors. Before Judge JOHNSON. Chattahoochee Superior Court. September Term, 1872.

For the facts of this case, see the decision.

E. H. WORRILL, by PEABODY & BRANNON, for plaintiffs in error.

No appearance for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff, as guardian of the minor orphans of A. C. Hickey, deceased, against the defendants, on a promissory note for the sum of \$204 12, dated 4th March, 1862. It appears from the evidence in the record that the note was turned over to the plaintiff, as guardian of the children of Hickey, in 1863, and that, at the time of the trial, all of the children of Hickey were of age except one. A motion was made by the defendants to dismiss the case on the ground that the plaintiff had failed to file an affidavit of the payment of taxes, which motion the Court overruled. The defendants then requested the Court to charge the jury, that if the evidence showed that some of the children were of age, and some not, then the plaintiff was entitled to have a verdict as to those under age, for their *pro rata* shares of the note, but could not recover as to those who were of full age, unless there was proof that, after coming of age, they had paid taxes on their parts of the note; which request the Court refused, but charged the jury that if the evidence showed that the note sued on was turned over to the plaintiff, as guardian for

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the children of Hickey, and that they were all of age except the youngest, it was lawful for the plaintiff to have a judgment against the defendants without proof of the payment of taxes on the note, to which charge, and refusal to charge as requested, the defendants excepted. In our judgment, there was no error in the refusal of the Court to charge as requested, or in the charge as given, on the statement of facts disclosed in the record.

By the fourteenth section of the Act of 1870 it is declared that "nothing in this Act shall be so construed as to affect any claim due any widow, or minor, contracted prior to June 1st, 1865;" therefore, the note sued on is a claim excepted from the provisions of that Act requiring taxes to be paid thereon, even if the Act is a valid, constitutional law, which, in my judgment, it is not.

Let the judgment of the Court below be affirmed.

WILLIAM A. GATEWOOD, plaintiff in error, vs. THE CITY BANK OF MACON *et al.*, defendants in error.

When A filed a bill against the City Bank of Macon, charging that he was the holder of a mortgage made by B on certain real estate, founded on a valuable consideration; that the said City Bank was also the holder of a mortgage made to it by B upon the same property; that the mortgage to the bank was given to secure the payment of a note made to the bank by B for the loan of money at more than seven per cent. per annum, and was therefore null and void; that the mortgage to the bank was of older date than the mortgage to A; that the junior mortgage contained upon its face notice of the mortgage to the bank; that the mortgage to the bank had been regularly foreclosed by rule nisi, notice and judgment of the Superior Court of the county of Putnam, where the land was situated, and ordered to be sold to satisfy it; that B was insolvent, and that unless A could set aside this illegal mortgage, he would lose his money.

The bill prayed an injunction. The defendant, on the rule to show cause, denied there was equity in the bill, and insisted that if the complainant had any remedy, it was at law, under sections 3903 and 3892 of the Revised Code. The Judge refused the injunction, and the complainant excepted:

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Held, That there was no error in the judgment of the Court refusing the injunction. Admitting that the note, to secure which the mortgage to the bank was given, is null and void for usury, if the complainant has any remedy, it is only under sections 3903 and 3892 of the Code, and as that remedy, if it applies to his case, is made ample and complete, equity has no jurisdiction.

Injunction. Mortgage. Usury. Before Judge HILL. Putnam county. At Chambers. March 31st, 1873.

William A. Gatewood filed his bill against the City Bank of Macon, Benjamin F. Adams, and James L. Wilson, sheriff of Putnam county, making the following case :

Adams was indebted to complainant in large sums of money, and complainant was also liable in divers other large amounts as indorser, security and guarantor for him. In order to secure the complainant in the amount of said indebtedness and to indemnify him from loss on said contingent liabilities, Adams, on March 3d, 1872, executed to him a mortgage upon certain personal property and real estate in the county of Putnam, said instrument setting out a prior mortgage on said realty given to the City Bank of Macon. This last mentioned instrument was executed under the following circumstances : On April 28th, 1871, Adams negotiated a loan from said Bank upon two notes for the aggregate amount of \$10,000 00. Said notes were discounted at the rate of one and one-half per cent. per month off, or at some other rate exceeding seven per cent. per annum. Contemporaneously, the mortgage aforesaid was executed to secure the payment of said notes. Said mortgage has been foreclosed, the execution issued thereon levied upon the property described therein, and the property advertised for sale on the first Tuesday in January, 1873. Complainant's mortgage has also been foreclosed.

The instrument under which said bank claims a lien, and all proceedings based thereon, are utterly null and void as contrary to the laws of this State, enacted as a restraint upon banks to prevent their usurious charges. Unless complainant is enabled to avail himself of his mortgage, he will lose large sums of money, as said Adams is hopelessly insolvent. Prayer,

that said judgment of foreclosure be decreed null and void; that the City Bank of Macon may be perpetually enjoined from enforcing the same; that the writ of injunction may issue restraining the said City Bank of Macon and the said James L. Wilson, sheriff of said county, from proceeding further at law against said mortgaged property; and that the writ of subpoena may issue.

A temporary restraining order was granted by the Chancellor, (Hon. P. B. Robinson,) and the third Monday in March, 1873, was appointed for a hearing of the motion for an injunction. At the time designated, Judge Bartlett, of the Ocmulgee Circuit, having been of counsel, was disqualified from hearing the motion, and it was agreed between counsel that the case should be heard by Judge Hill.

The Chancellor refused the injunction, and the complainant excepted.

WILLIAM A. REID, for plaintiff in error.

A. PROUDFIT; C. L. BARTLETT, for defendants.

MCCAY, Judge.

The general rule that a judgment of a competent Court concludes the parties to it and their privies, on all questions pertaining to the merits of the action, is almost without qualification, and is of universal acceptance: See Phillip's Evidence, volume 2, pages 4-10; and Cowen's American Notes to Phillips, volume 4, page 1. Even equity will not interfere, except for fraud, accident, surprise, mistake, etc., and only then on proof of due diligence by the complainant. And Lord Eldon, in 14 Vesey, 31, says in reference to this very question, of coming into equity for relief against a judgment at law, on the ground of usury, that the neglect to plead at law is no ground for equitable interference. There is, however, a class of judgments in England, and in many of the States of this Union, where Courts, both of law and equity, have interfered, to-wit: judgments entered by confession under a warrant of

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attorney. And the foundation of the interference is, that the judgment obtained, as it is, without notice or pleadings, but confessed on the record by an attorney, under an authority attached to and part of the usurious contract, is from its very nature, a part of that original oppression and illegality against which the usury laws were aimed. Originally, even in such a judgment, the Courts would not interfere, in consequence of the estoppel which every judgment creates between the parties; but subsequently, under a suggestion of Lord Hardwick, it was done in the Common Pleas and King's Bench, though in the Exchequer it has been uniformly refused. In *Fannin vs. Dunham*, 5 John. Chancery Reports, 121, Chancellor Kent entertained a bill for relief against such a judgment, on the ground that the New York Law Courts had lately ceased to interfere, even with such judgments. In doing so, however, he goes into the history of the practice of the English Courts on the subject, reviewing the cases, and showing the origin, reason and history of the practice. But in *Fannin vs. Dunham*, the Chancellor only interfered on the payment by the complainant of the principal with legal interest, and he then shows that it is only on such terms that even a Court of chancery will interfere, even with a judgment obtained by confession on warrant of attorney.

In 2 Hill (S. C.) Chancery Reports, 474, the Chancellor says that a case is not to be found in the books, of an interference by chancery with a judgment at law, obtained in the usual mode, under pleadings and notice, on the ground of usury in the original contract. That contract has been merged into the judgment, which imports absolute verity; and it is conclusively presumed that the parties made all the defenses allowed by law, and that the judgment is the conclusion of law on the true facts of the transaction. In *Thomas vs. Berry*, 3 John. Chancery, 399, there was a bill filed for relief against two judgments—one obtained by confession and warrant of attorney, and one on regular proceedings, by process, service, etc. The bill charged the most oppressive usury in both cases, but the Court, while it entertained the bill and

gave relief (on the terms laid down in *Fannin vs. Dunham*,) against the judgment obtained by confession under warrant of attorney, refused to interfere with the regular judgment. The complainant was in *laches* for failing to plead, and the Court was restrained by the stern rule that the judgment at law was an estoppel.

As a matter of course, if there be fraud in any of the other grounds for equitable interference, there is no difficulty ; but if the only objection to the judgment is that the original debt was usurious, the doctrine seems to be settled that it is too late to ask even chancery to interfere, after a regular judgment at law. Nor are we able to see how the case is strengthened when the complainant is a creditor of the defendant, instead of the defendant himself. He is clearly a privy of the defendant ; his only interest in the matter is, that the defendant is his debtor. He comes into the controversy through the defendant, and it would entirely upset the whole doctrine of the conclusiveness of judgments, if they were liable to be attacked on their merits by other creditors of defendant. Indeed, as a general rule, even accident, mistake, surprise, etc., as objections to a judgment, are matters to be set up only by the defendant. If he submits to them, it is nobody else's business. So far as I have been able to find cases of interference against a judgment, by others than the defendant, they are all for want of jurisdiction, or for fraud and collusion. And but a moment's consideration will show that this must be the proper rule. There never would be an end of litigations, if after the defendant has had his day in Court, and a judgment has been pronounced, every creditor shall have his day, also, and have the issues re-examined. Nor is there anything in the fact that the issue sought to be made is not, *nil debit*, payment, off-set, failure of consideration, etc., but illegality of consideration. The laws of this country and of England permit, but do not require, men to plead illegalities. It is, perhaps, true in morals, that all a man has he holds only in trust for his creditors, and a good man will doubtless act with this great moral principle before him. But the laws of

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no country, that I am aware of, put him, in fact, so far in the power of his creditors, as that they may oversee his bargains and inquire into the propriety of them. He may pay usury if he pleases, or debts barred by the statute of limitations, or racing debts, or make a bad trade, or submit to a judgment, based on transactions of this character, without fraud upon his creditors in law. In a great many cases, it has been solemnly adjudged that the plea of usury is a personal privilege, and can only be taken advantage of by the debtor himself: Campbell *vs.* Johns, 4 Dana, 177; Fenner *vs.* Sayer, 3 Alabama, 458; Cook *vs.* Kornegy & Dyer, 3 *Ibid.*, 646; Speigler *vs.* Snap, 5 Leigh., 478; DeWolf *vs.* Johnson, 10 Wheaton, 367; Port *vs.* Dart, 8 Paige, 639; 2 Hill's (S. C.) Chancery, 474.

In this State this question has rarely arisen. Our Code, section 3538, provides that "creditors or *bona fide* purchasers may attack a judgment for any defect appearing on the face of the record, (so as to make it void and not merely irregular, section 3535,) or for fraud or collusion, whenever and wherever it interferes with their rights in law or equity." Nothing is here said about going behind a judgment and attacking it for illegality of the consideration, or want of consideration, and we apprehend no such thing was thought of. The case of *Solomon vs. Pope*, in 36 *Georgia*, was not the case of a judgment, but of a simple contract debt, and the circumstances were peculiar. There was a privity between all the parties. The debtor had sold his goods, and the purchaser had agreed to pay the purchase money to the creditors of the seller. Solomon was mentioned by name, the others generally. As the case was before the Court, Pope, one of the creditors, had garnisheed the purchaser, and he, Pope, knowing the terms on which the purchaser had bought, filed a bill to attack Solomon's debt on account of usury. Here was a fund belonging to an absconded debtor, in hand, none of the debts were in judgment, the fund had been, as the record was before the Court, appropriated by the debtor to the creditors. And this Court, on the idea, we suppose, that under the circumstances of the case

the principles of a trust or the usages of a Bankrupt Court were applicable, sustained the bill. The privity then existing, by reason of the written orders of the debtor, make that case stand on special circumstances. Otherwise it would be contrary to the uniform current of decisions, and a dangerous innovation on established principles.

What is the proper construction to be given to our Act of 1866, and to section 3903 of our Revised Code, we do not now decide. We are clear, that previously to that statute, equity would furnish no remedy for the complainant as he has made his case. If so, that statute will not authorize him to come into equity. Whatever remedy he has by that statute is under it and under the method it prescribes, and he gives in his bill no reason why that remedy cannot be used by him. Whether that statute gives him new rights, or whether it only authorizes him to do at law what, before, he might do in equity, to-wit: attack the mortgage or judgment for fraud or collusion, or for matter appearing on the face of the record, rendering it invalid, or whether it in truth opens the whole question upon the merits to reinvestigation at the demand of each creditor of the mortgagor, we do not determine. A Court of equity has no jurisdiction of the case made by the bill, and not having any authority over it, such a Court is not the proper tribunal to decide the question. We, therefore, simply affirm the judgment of Judge Hill, refusing the injunction—leaving the other questions open until they come up from a Court having jurisdiction.

Judgment affirmed.

WARREN AKIN, plaintiff in error, vs. JOHN R. FREEMAN,
defendant in error.

1. The eighth and twenty-ninth sections of the Act of 1856, prescribing that after seven years without an entry, etc., a judgment shall not be enforced, but shall be presumed to be satisfied, and also that where a *bona fide* purchaser has been in the possession of real property four

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years, it shall be discharged of the lien of any judgment against the person from whom he purchased, were parts of a statute of limitation in force on the 30th of November, 1860, and were by the terms, spirit and intention of the Act of that date suspended; and by the various Acts from 1860 to 1865, the suspension was continued until the close of the war.

2. Shorter sold land to Rice, against whom there was a judgment, and gave Rice a bond for title. Rice, without paying any of the purchase money, sold to Freeman, agreeing to transfer Shorter's bond, but not having it at the time, gave Freeman his own bond. This was in 1860. Freeman at once paid a portion of the purchase money to Rice and went into possession. A short time afterwards, Freeman paid a sufficient amount to pay Shorter, which was done with the money so advanced, leaving a portion still unpaid to Rice. Freeman subsequently, in 1862, forwarded this to Rice, who, by express, sent his own deed to Freeman. Freeman demanded the bond of Shorter, and Rice replied that he had given him that before. Nothing more was done until 1867, when the judgment creditor levied on the land as Rice's property, and after this levy, Freeman obtained Shorter's deed without warranty :
- Held*, That no title ever vested in Rice which was the subject of levy and sale.

WARNER, Chief Justice, dissented.

Statute of limitations. Judgment. Execution. Bond for titles. Before Judge HARVEY. Floyd Superior Court. January Term, 1872.

On November 22d, 1858, Akin recovered a judgment in Cass Superior Court against the Cherokee Baptist College, as principal, and John H. Rice, as indorser, for \$1,000 00 principal, besides interests and costs. Execution was issued on this judgment on December 6th, 1858, upon which were the following entries: A receipt, signed by the clerk, for \$9 25 costs, dated July 26th, 1859; a receipt from plaintiff to the defendant for \$156 75, interest due thereon, dated December 22, 1859; an affidavit by the plaintiff that Rice had removed from, and then resided out of the limits of the State of Georgia, dated May 11th, 1867; a levy upon a lot of land situate in the city of Rome, dated May 31st, 1867. The property levied on was claimed by John R. Freeman. The evidence upon the issue thus formed made the following case:

In the fall of 1858 Rice bought the property in dispute

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from Alfred Shorter, taking a bond for titles, but paying no portion of the purchase money. About March 1st, 1860, Rice sold the lot to Freeman, but not having Shorter's bond at hand, executed his own bond, receiving at that time \$1,000 00 in money. Freeman went into possession, and a short time thereafter made another payment to Rice, out of which the entire balance due to Shorter was paid. In 1862, Freeman sent the balance due to Rice to him, and he immediately forwarded to Freeman his deed, dated March 4th, 1862. Freeman demanded Shorter's bond for title; Rice replied that he had before that time delivered it to him. Freeman knew of no judgment or lien against the land until January, 1867. On the 9th of January, 1869, he procured a deed from Shorter, without warranty.

The jury found the property not subject. Whereupon, the plaintiff in execution moved for a new trial upon the following grounds, to-wit:

1st. Because the Court erred in the following charge to the jury: "If seven years had run against this *fi. fa.* without proper entries during that time, it would be dormant and could not bind the land."

2d. Because the Court erred in the following charge: "If Freeman was a *bona fide* purchaser for value, without actual notice of this judgment, and held possession of this land for four years prior to the levy, the land in his hands is discharged from the lien of the judgment, even if it is not dormant."

The motion was overruled, and plaintiff excepted.

WARREN AKIN; ALEXANDER & WRIGHT, for plaintiff in error.

SMITH & BRANHAM, for defendant.

TRIPPE, Judge.

The question, whether the different Acts suspending the statutes of limitation operated to suspend the statutory provisions in reference to judgments becoming *satisfied* or dor-

mant, by having no entry upon them within seven years, or having their lien discharged, so far as relates to property sold by the defendant, when the purchaser has been in possession of land so sold for four years, has been for several years exhaustively argued before this Court, and in the decisions heretofore made. I do not propose to be prolix, or to wrong the professional reader, in giving the reasons for my concurrence in the judgment pronounced on these points at this term.

There is not a more universally fixed and accepted rule than that, in the construction of statutes, the intention of the Legislature, when discovered, shall prevail. The ninth clause of the fourth section of the Code, in enacting rules for the construction of statutes, says: "In all interpretations the Courts shall look diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil and the remedy:" See 2 Cranch, 33; *Ibid.*, 386; 1 Black's Reports, 61; 4 Dallas, 14.

Keeping this principle in view, let us look into the first Act, passed November 30th, 1860, touching the question of suspension. The fourth section says: "It shall not be lawful for any plaintiff in *fi. fa.*, his agent or attorney, to have the same levied upon the property of any inhabitant or corporation of this State, until the first of December, 1861;" and after making several provisions to suspend sales in cases of levies then pending, and allowing levies where defendants were removing, etc., it provides that the statutes of limitation shall cease to run, etc., during a certain period, to-wit: the suspension of the banks. It will be observed that the restraining provisions of this Act applies exclusively to the enforcement of judgments by levy, and placed no barrier or prohibition whatever against bringing suits or actions by creditors or plaintiffs.

What reason could there be to enact a law preventing executions from being levied, which would become dormant if an entry were not made upon them within seven years by the officer authorized to execute and return the same, and to make no provision against such a result, but to provide simply that

there should be a suspension of any Act of limitation upon the *right of a creditor to sue*? There was nothing in the Act affecting the right to bring an action—nothing denying that; and a creditor with a claim not in judgment was in no way touched by the Act. The judgment creditor was barred from levying, and thereby made to lose or risk his debt for his failure so to do, unless some relief was granted against the other law on the statute book, thus endangering his right. One class of creditors, not within the scope of the Act or in danger of being hurt by it, would thus have all *bars*—all limitations against them removed, whilst the other class, who had new disabilities imposed upon them, would be denied, not only the benefit or relief granted to the first, but forced, seriously if not fatally, to hazard their right of final collection by submission to the law itself. If the creditor could have managed to have had an “entry” made, so as to prevent his becoming disabled to enforce his judgment at all, under the eighth section of the Act of 1856, then in force, I have never been able to see by what means he could preserve his lien on land sold by his debtor, provided the Act continued for four years, and the purchaser remained in possession during that time. The Act was, in fact, by repeated legislation, continued in force for more than four years; and if the twenty-ninth section of the Act of 1856 was not suspended, then we would have had the spectacle of a Legislature forbidding a creditor to move in the collection of his debt, and, at the same time, keeping in operation a law whereby he should lose his lien on whatever real property his debtor might sell. Such a construction would not only make the Legislature, in inserting the suspending clause in the Act of November 30th, 1860, guilty of a foolish discrimination in favor of those who had no need of it, but also guilty of a great wrong and outrage against those to whom the relief was denied, and who were the only persons who were legislated into a position to demand it. Reason and a sense of justice would require a Legislature, whenever it suspended the power of a citizen to assert his rights, also, at the same time, to suspend any and every law

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that imposed disabilities upon him for his failure to assert them; and Courts would be quick to construe in his behalf any words in such enactments, that, by any reasonable fairness, could admit of a construction that would prevent such gross injustice.

In this view could it be called a violation of any fair rule of construction, to say that the Legislature intends to, and did, by this clause of the Act of 1860, suspend the eighth and twenty-ninth sections of the Act of March, 1856, even if the eighth section had been simply a provision as to judgments becoming dormant, and not a statute of limitation as it was held to be in *Chambliss vs. Phelps*, 39 Georgia, 386; *Battle vs. Shivers*, *Ibid.*, 405; *Horton vs. Clarke*, 40 Georgia, 412?

Such Acts as the Dormant Judgment Act of 1822-3, have been called by the Courts and the Legislature, Acts of limitation. In 7 Georgia, 166, this Court, in giving a construction to that Act, said: "We are of opinion that there is nothing to prevent the Legislature from *fixing a time within which an existing judgment shall be enforced*, as well as to pass any other *Act of limitation*." Words of a similar import were used in 2 Kelly, 255, in reference to the same Act of 1822. So in Charlton's Reports, 330, 331; and there are several other instances where Courts have so denominated such Acts. The Legislature in the third section of the Act of 1866, commonly known as the "stay law," in referring to the laws in relation to *limiting liens*, expressly call them "statutes of limitation." If, then, these words have been so often used by the Courts in that sense, and by the Legislature in the series of Acts on the same subject, have been in terms so directly applied, and the spirit and justice of this Act of 1860 so strongly call for a construction of the same words therein used, in order to prevent great wrong and injustice, and I may say to protect the Legislature itself against a gross absurdity in the meaning of its enactments, we are furnished with sufficient, if not overwhelming reason, whilst looking for the intention of the law-maker in passing the Act of 1860, and "keeping in view the old law, the evil and the remedy,"

to hold that where the Act in one clause prevented a judgment from being enforced, and in the next clause suspended the "Acts of limitation," it meant to suspend any and all Acts which imposed penalties, forfeitures, losses or any hurt or damage whatever that might otherwise result from obedience to that Act. I will add that, in my individual opinion, no one for a long time entertained a doubt as to this being the proper meaning of that Act, and that the universal opinion of lawyer and layman was that, under its provisions, no judgment creditor ran any risk of losing his lien, or of his judgment becoming barred or dormant.

I have referred to the words used in the Act of 1866, styling these Acts "statutes of limitations," for the purpose of showing how these have been applied by the Legislature, as well as by the Courts. It is denied that these Acts were suspended by the Act of 1866, because as it only suspended "all statutes of limitation, relating to the liens affected by the Act," and as the whole "stay law" feature of it was declared unconstitutional, therefore no lien was *affected* by it, and consequently no statute was suspended. Be that as it may, the force of the reference is just as strong. The Legislature may not have the power to enact a stay law, but yet, the sense in which it used the words "statutes of limitations," is as clear as it would have been had the Act been declared in its main provisions valid. It may be, also, pertinent to add, that although the portion of the Act of 1866 preventing liens, etc., may have been unconstitutional under the principle of the decision in the case involving the Act of 1866, yet the suspension clause in it was independent of the stay law feature, and had no words limiting or confining its meaning to, or making it contingent on other portions of the Act, which were of no effect. The Legislature intended to prevent executions from being levied, and it said so in plain unmistakable terms. It of course thought the Act constitutional, and that it would be enforced. Its enforcement without further provisions, would have worked wrong to judgment creditors. To prevent this, the Legislature inserted an independent clause, sus-

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pending the statutes of limitations. The intention of the Legislature in this last provision is as plain as if no constitutional question could arise as to the former part of the Act. Moreover the people, the subjects of the law, almost with one accord, accepted the Act, the whole Act, with all its parts, and submitted to it, believing that whether it was or was not constitutional, its observance would not work a denial of all rights, for there was a saving clause protecting them against injury from lapse of time. And thus the whole force of the reason of the rule as to the intention of the Legislature, the spirit and reason of the statute, "the old law, the evil, and the remedy," remains practically unimpaired.

I have referred to the decisions in 39 *Georgia*, 386, 405, and 40 *Georgia*, 412, where it was held that the eighth section of the Act of 1856 was a statute of limitation, and was suspended by the Act of 1860, and the suspension continued by the subsequent suspension Acts. It is there said that the suspension of this section operates to revive the next preceding Act which regulated the subject, to-wit: the Act of 1822-3. I have already said, in substance, that had the eighth section of the Act of 1856 been in the terms of the Act thus said to be revived, it would none the less have been suspended by the Act of 1860 and similar subsequent Acts. It would have been but a poor boon to have barred the creditor of his right to levy, and to have told him that, in the meantime, he should be compensated by being relieved from the statute which would hold his judgment paid and satisfied, and substituting therefor another statute which would only make it dormant—that a fatal poison should not be administered which would produce death to the debt, but only an opiate to effect a sleep which would kill its lien. Such could not have been the intention of the Legislature.

If the suspending clause in the Act of 1860 had such an effect, then, as the Act of 1856, known as Cone's Act, was a codifying Act of all the statutes of limitation, and, in some instances, changed the rule as to time, and was in force on the 30th of November, 1860, would not its suspension have revived

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the preceding statute of limitation, and thus there would never have been any suspension whatever, at least, by virtue of the Act of 1860, and the subsequent Acts continuing it in force? On the 14th of December, 1861, a general Act was passed suspending "the statutes of limitations then (now) in force during the war." This was independent of the Act re-enacting the one of 1860.

Upon the view of the whole question, considering the situation of the people at the time, the policy of the Legislature as indicated by these statutes, the special provisions and working of the Acts, and their actual effects upon debtor and creditor, it was clearly intended that, in the midst of threatened and actual war and revolution, debtors should not only not be harassed by levies and sales of their property, but that creditors should in no way suffer deprivation or loss beyond the postponement of their right for the immediate enforcement of their claims.

The Act of 1860 was, by several subsequent Acts, continued in force until the end of the war, and the levy having been made in 1867, the judgment cannot "be held and taken as fully satisfied and paid," or dormant, or that four years' possession of land by a purchaser during that time discharged it of the lien of such judgment.

But the next question is, did the lien of the judgment ever attach to this land? Did Rice, the defendant, ever have any interest in the land that could be levied on? He bought two parcels of land, one from Shorter and one from Alexander, taking bond for titles without paying any purchase money. There was, thus far, certainly no interest in Rice, subject to levy and sale. Whilst in this situation he sold both parcels to Freeman. The land bought from Shorter is the property levied on. Rice states in his testimony that he transferred Shorter's bond for titles to Freeman. Freeman says it was the contract that he was to do so, but not having the bond of Shorter's at the time, Rice's own bond was given as a temporary arrangement. Freeman paid Rice a portion of the purchase money, and afterwards enough to pay off the whole

purchase money due Shorter, which was done. When Shorter was thus paid and the right existed as against him to demand a deed, Rice neither held the land under bond for titles, nor was he in possession of the land, nor did he hold a bond for titles, for Freeman had the right to that, and the right to a deed from Shorter. Any equity that accrued by virtue of the payment to Shorter, accrued to Freeman, and previous to the contract between Rice and Freeman, Rice only had a naked equity which was never the subject of levy and sale. Whatever further equity arose as against Shorter or in favor of any one, was on account of the payment with Freeman's money and vested in him.

It is true, a judgment is a lien on all the property of a defendant. But it has never been held that it can be enforced by a levy and sale of land held under a bond for titles, where none of the purchase money is paid. If the purchaser thus holding has paid all the purchase money, then he has a perfect equity liable as property to which he has a legal title. The 3528th section of the Code provides, that "where a person holds property under a bond for titles and the purchase money has been partially paid, the same may be levied on under judgments against such persons, and the entire interest stipulated in the bond shall be sold." It then proceeds to provide for the protection of the vendor as to his claim for the unpaid purchase money. But in this case, as already stated, when the purchase money was paid to Shorter, Rice was not a holder of the property or bond for titles in any legal or equitable sense. In the case of *Ware vs. Jackson*, 19 *Georgia*, 452, the facts were, that in January, 1845, Baker sold to Iverson and gave bond for titles on the payment of the purchase money. In November, 1846, Ware recovered judgment against Baker. In March, 1848, Baker made a deed to Iverson, having received the purchase money. Iverson afterwards sold to Jackson. Ware levied his judgment, and Jackson interposed a claim. The Court below held the land was not subject, whilst a majority of this Court reversed the judgment of the Court below, and held on strictly legal grounds that the land was

subject. Yet Judge LUMPKIN concurred with "doubt and misgiving," and Judge BENNING dissented, concurring with the Court below, that the lien of the judgment never attached to the land. In that case there was the legal title in the defendant in judgment, when it was obtained, and the purchase money not paid, and yet the Judge below who tried the case did not think the land was subject—one Judge of this Court concurring with him, and another hesitatingly deciding to the contrary. I refer to this case mainly for the purpose of calling attention to the position taken in the decision, and the force that was given in the argument to the rule that equity looked upon things agreed to be done as actually performed, and to make an application of that principle to the contract between Rice and Freeman at the time it was made, that Freeman was to have the bond of Shorter. But I will leave the further discussion of this point to my brother McCAY, who concurs with me on this branch of the case. I cannot see, if this case were sent back, how the verdict could be contrary to what it is, although the Court below erred on the other questions involved, for I am satisfied the land is not subject in any view that may be taken of the case, unless there was fraud in the transaction, which is not pretended. If the verdict is right upon all the facts and law of the case, a new trial will not be granted, although the charge of the Court may be erroneous upon some of the points involved: 41 *Georgia*, 675; 42 *Ibid.*, 244, 587; 33 *Ibid.*, 207, 173.

Judgment affirmed.

McCAY, Judge, concurring.

As to the dormancy of the judgment, I have stated my views fully in *Battle vs. Shivers*, 39 *Georgia*, 405, and I am satisfied with what I then said. It seems to me that all this effort to pervert the words "statute of limitations" in the Act of 1860, so as to make them include the Dormant Judgment Act, is an after-thought to which men's minds come in their efforts to save judgments from that neglect which, du-

ring the war, attended all business. Men have suffered and do suffer, from that neglect in other matters, and if they suffer also because of their neglect to attend to the preservation of their liens, I feel no disposition to aid them to the injury of purchasers and younger liens. As I said in *Battle vs. Shivers*, the Dormant Judgment Act is an Act, the intent of which is to require notice of a judgment lien to be given upon the public records, once in seven years, that the plaintiff still claims his judgment to be a subsisting one. And there is nothing in the Act of 1860, nor in the circumstances of the war, to excuse a man from giving a notice, if the effect of his failure has been to mislead purchasers and allow younger liens to vest. True, it is a misfortune to the plaintiff, but it is better that he should suffer than that others, who have acted from ignorance, caused by his fault, should make way for him. The Act of 1856, in so far as it declares the judgment presumed to be satisfied, so that it cannot be sued upon or revived after the seven years, (if the Act is to have that construction, which I am not sure of,) may be a statute of limitations, and may have been suspended. But if this be its meaning, its suspension, in my judgment, leaves the Act of 1823 in full force. Whilst the Act of 1856 was in operation, it protected purchasers and junior liens without any necessity of a resort to the Act of 1823. If the judgment was dead, satisfied as to the defendant, purchasers and younger liens were protected under the protection of the defendant. But when by this suspension there ceased to be any protection to the defendant, the Act of 1823, protecting purchasers and younger liens, (which was not a statute of limitations, but, as I contend, was an Act the object of which was to regulate the rights of third persons against the property of the debtor,) was left in full force. Our law now requires mortgages to be recorded in three months, to make them notice to third persons. If we were to adopt a law making them void if not recorded, this, while it was of force, would protect purchasers as well as mortgagors, and the present law would be of no practical use; but if the new law should be suspended, the present law

would still be of force and be of practical operation, for the simple reason that the present law has a special purpose, to-wit: to give notice. The new law would have another purpose, to-wit: to affect the mortgager, and the suspension of the new law would leave the old standing in full operation, not because it revived the old law, for that was not repealed, or even superseded by the new, but because the removal of the new protection left the old to operate.

On the other point in this record, I adhere to the decision of *Chapman vs. Aiken*. I did not in that case give my reasons for concurring. The great mistake that is made by those who treat this Act and the Dormant Judgment Act as statutes of limitation is, they forget that the questions are not between the plaintiff and defendant, but between the plaintiff and *third persons*, and that both of these Acts have for their object the protection of purchasers. By our law, a judgment, from the date of its rendition, is a lien on all the property of the defendant wherever it may be found in the State. It has its iron heel so surely planted that whoever, within the limits of the State, buys land of the defendant, is charged with notice of the judgment and buys subject to it, with the single condition that this lien, if the purchaser goes into possession, ceases in four years. Statutes of limitation are *always* based upon the idea that the party barred by them has delayed action so long that the presumption arises that his claim is satisfied, or that by the death or disappearances of witnesses, or loss of papers, the defendant has lost his evidence. Hence, if the plaintiff be under disability, as nonage, coverture, imprisonment, etc., the statutes almost uniformly except him from their operation, or if the defendant has acknowledged the debt, or recognized the title, the statutes only run from the acknowledgment.

This Act is based on different principles. The plaintiff's judgment is matter of record—when satisfied, the record shows it. It may lose its lien, though unsatisfied. The ground of the protection intended for the purchaser is, that the plaintiff is in fault for having failed to make his money out of the de-

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fendant. Ordinarily the defendant has other property. A man rarely sells *all* he has. And the language of the law is not that "your debt is satisfied," but that you have failed, when you had it in your power, to make your money out of the defendant. You have stood by four years, seen this purchaser in possession, allowed him, perhaps to improve this property, and having done so, you are rightly barred. But there is, I think, a stronger view of it than this. The purchaser is bound to take notice of the judgment. He cannot plead ignorance. The judgment is a record, and the world must notice it. Every man, therefore, who buys with the lien, has an inevitable burden on his title for four years. He takes the risk that the defendant will pay, or that the plaintiff will make the money out of other property, and he has generally a warranty from his vendor that this will occur. But he buys with this distinct understanding that at any time within four years his land may be levied on, and with the additional understanding that if four years elapse, his land shall be free. It makes no difference whether the plaintiff be under disability or not, nor does it make any difference if, on the very last day of the four years, the lien be *recognized*. Indeed, for four years the lien is inevitable, recognized or not. The purchaser might recognize it, and it would be no stronger. He might repudiate it, and it would be no weaker. But on the very day after the four years is up, the lien is gone. It cannot be recognized after that, even by a written acknowledgment that he bought the land after the date of the judgment, and that the judgment is still unpaid.

For these reasons I think this Act is not a statute of limitations, but that its scope and meaning is to say that the lien exists against defendant's land going into the hands of purchasers, upon *condition* that the lien is asserted in four years, and that the purchaser buys the land subject to the lien, provided it is enforced in four years. It stands on precisely the same footing as did the right of action to the representative of Lacy in the case, decided at this term, of *The Selma, Rome and Dalton Railroad Company vs. Lacy*.

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There the Code of Alabama had provided that the representative of one who had been tortiously killed, might, within twelve months, maintain an action for damages against the wrongdoer. A suit was brought in this State on the statute. By the general rule of law the statute of limitations of the place of trial regulates the right of the parties to sue. Our statute of limitations for torts is two years. But this Court unanimously held that the suit must be brought within twelve months, because *it was upon that condition* that the right of action was given by the law of Alabama. The Chief Justice even holding that the declaration (which was seriously defective when brought, so that no right of action was set forth) could not even be amended after twelve months, and this, though by our statute of limitations, the plaintiff has two years to sue for such a tort.

But under the facts of this case, as they appear without question in the record, I am of the opinion, with my brother TRIPPE, that the defendant in this *fi. fa.* never had such an interest in this land as was the subject of levy and sale, as the plaintiff has undertaken to levy and sell it. By the law of England, an imperfect equity could not be levied upon by a common law *fi. fa.* The law only recognized legal titles, or such perfect equities as the statute of frauds made the subject of levy and sale, or the statute of uses executed. Hence, even an equity of redemption in the mortgagor was not subject to an execution at law. And it was a general rule, that where the interest of the defendant was one cognizable only in a Court of equity, a judgment at law was not a lien upon it, and could not sell it: 2 Lewin on Trusts, 665; see, also, Doe vs. Greenhill, 4 B. & A., 684; Harris vs. Baker, 4 Bingham, 96; Haynes vs. Baker, 5 Ohio, 253; Tyree vs. Williams, 3 Bibb, 366; January vs. Bradford, 4 Bibb, 566. Nor did our law, prior to the Code, make any change in this rule in principle. A mortgage, it is true, was considered even at law only as a security, and not a title, so that the interest of the mortgagor was treated as a *legal* interest, and not simply an equitable one, so that it became, logically, subject to levy and sale under a

judgment against the mortgagor. But this Court has on several occasions ruled that an equitable interest was not bound by a judgment at law, unless that interest was what is called a perfect equity. In the latter case it was made subject by the statute of frauds, even in England, and as a matter of course it became so here, by the statute adopting the statute and common law of England: *Pitts vs. Bullard*, 3 *Georgia*, 5. In *Hammock vs. Myrick*, 14 *Georgia*, 77, this Court held that the interest of the drawer of land, before the grant issued, is not subject to levy and sale.

In *Dandle vs. Neal*, 10 *Georgia*, 148, the land had been sold as the property of Whitehurst and bid off by Pou. Subsequently Pou agreed with Whitehurst that he might have back the land by paying him back the amount of his purchase, \$1,200 00. Whitehurst paid about \$900 00. They then made a new agreement, by which, in effect, Pou sold the land to Geddings, the parties revoking the first contract with Whitehurst. This Court held the property not subject to an execution against Whitehurst existing at the time the \$900 00 was paid, and the Court say, page 157, "By the leading case (*Pitts and Bullard*,) the contract must be executed, nothing must remain to be done, before the purchaser can acquire a title, so as to make it liable at law to an execution. He must pay down *the entire consideration*. At any time before this is done, the parties may come together and annul or vary their contract." The case of *Ware vs. Jackson*, 19 *Georgia*, 452, and *McGregor vs. Mathis*, 32 *Georgia*, 417, go on this same idea. In the former case, land bargained by A to B before the judgment, A retaining the title and giving B a bond for titles, was held subject to a judgment against A, obtained before *all* the purchase money was paid. In 32 *Georgia*, 417, the land was held not subject to a judgment against the vendor who retained the title, but who transferred without recourse the vendee's note. In all these cases the question turned on who had the legal title. The general rule being that the land is subject to a judgment against the holder of the legal *paper* title, but if that be a mere naked title, and the beneficial in-

terest be entirely in another, then it is subject to an execution against that action. Such, as I understand it, is the settled rule as to the lien of a judgment at law upon an equitable interest in land. Under the Code, the vendor may, if the purchase money be unpaid, file a deed in the clerk's office and then levy: Irwin's Code, 3604. If one who is not the vendor desires to subject to his judgment land partly paid for, he must levy on the land, the whole title, and give the maker of the bond notice. The whole title is sold, the vendor getting the preference for his unpaid purchase money: Irwin's Code, section 3528. But both these provisions recognize the position now assumed. The sale in both cases is of the legal title. Section 3228 is a substitute for the right the judgment creditor had to go into equity, pay the balance of the purchase money and have the land sold.

Under this view of the law, it is my judgment that there never has been anything in the defendant in execution in this land subject to levy and sale. When he sold to the claimant, he had only a bond for titles, and had paid none of the purchase money. True, he had improved the property, and equity would have authorized the plaintiff to file a bill, tender Shorter his money and sell the land. But at law, the defendant in the judgment had no leviable interest. He sold this interest to the claimant. It was the claimant who paid Shorter, and at the time of the sale it was agreed that the claimant should have a transfer of Shorter's bond. When Shorter was paid, he held the legal title. For whom? According to the testimony of claimant, for him. But even supposing that claimant took defendant's bond for titles, and relied on that, Shorter would have the legal title in trust for claimant and defendant. The defendant would not even then have a perfect equity, for the claimant's equity had come in before Shorter was paid.

In any view of it, as it seems to me, the right of defendant was not covered by the lien of the judgment. Certainly it is not so clearly so as to justify the pushing of its technical, rigid lien, so as to defeat the *bona fide* rights of the claimant.

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About the facts in the case there is no dispute, and if the judgment were to be reversed, on the error of the Court, the verdict must be the same.

WARNER, Chief Justice, dissenting.

This was a claim case. The plaintiff had his execution levied on a tract of land as the property of Rice, the defendant therein, which was claimed by Freeman, who claimed to have been in possession of the land for four years as a *bona fide* purchaser thereof from the defendant in execution, for a valuable consideration, and that the land was discharged from the lien of the judgment under the 3525th section of the Code. On the trial of the case it appeared that the plaintiff's judgment was obtained 22d November, 1858—execution issued thereon 6th December, 1858, and was levied on the land 31st May, 1867. Whether the claimant went into the possession of the land in 1860, at the time of his purchase, or in March, 1862, when he made the last payment for it, and obtained his deed from Rice, the evidence is not clear. The claimant states that he bought the land in good faith, and paid for it, and by himself and tenants, had been in possession of it ever since. There was considerable evidence as to the manner in which the claimant paid for the land and procured his title.

The plaintiff in execution requested the Court to charge the jury that the several statutes of this State limiting the time within which judgment liens should be enforced, were statutes of limitation, and were suspended during the war by the several Acts of the Legislature, enacted for that purpose, which the Court refused, but, on the contrary thereof, charged the jury: "If seven years had run against this *fi. fa.* without proper entries during that time, it would be dormant, and could not bind the land." The Court also charged the jury, that: "If Freeman was a *bona fide* purchaser for value, without actual notice of this judgment, and held possession of this land for four years prior to the levy, the land in his hands is discharged from the lien of the judgment, even if it is not

dormant." In my judgment, the Court erred in not charging the jury as requested, and in the charge as given, in view of the facts of this case, for the reasons stated in my dissenting opinion in the case of *Chapman vs. Aiken*, 39 *Georgia Reports*, 353.

By refusing to charge as requested, and in the charge as given to the jury, they were compelled to find that the plaintiff's *fi. fa.* was *dormant*, and could not bind the land; for seven years had run from its date up to the time of the levy on the land, unless the running of the statute of limitations applicable to it had been suspended during the war; and the same remark may be made as to the claimant's four years' possession. If the plaintiff's execution was dormant at the time it was levied on the land, as the jury were bound to find under the charge of the Court, then the plaintiff had no case, and it was not necessary for them to consider any of the other evidence offered by the defendant, and the fair legal presumption is that they did not do so. But it said there was sufficient evidence offered by the claimant to have *required* the jury to have found a verdict in his favor, although the jury did not pass upon that evidence under the charge of the Court as to the plaintiff's *fi. fa.* being dormant, and not having any lien on the land. Whether the jury would have found in favor of the claimant upon the evidence offered by him, if the charge of the Court had not made it necessary for them to consider it, this Court cannot know. In my judgment, that evidence falls very far short of being such as would have *required* them to have done so. It is quite clear, however, that the jury, under the charge of the Court, did not consider or pass upon it. I am therefore of the opinion that the judgment of the Court below should be reversed.

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THE SINGER MANUFACTURING COMPANY, plaintiff in error,
vs. THE DOMESTIC SEWING MACHINE COMPANY *et al.*,
defendants in error.

When the agents of two sewing machine companies were competitors before the Georgia State Agricultural Society for the premium for the best machine, the successful party who secures the premium is not entitled to an injunction to restrain the other from publishing in a newspaper that he, and not the other, received the premium. Courts of equity will not restrain the publication of a libel, nor use the writ of injunction to prevent parties from publishing untruths respecting their wares when there is no infringement of a property right.

Injunction. Equity. Libel. Before Judge HOPKINS.
Fulton county. At Chambers. December 24th, 1872.

The Singer Manufacturing Company, a corporation created under the laws of New York, transacting business in the city of Atlanta, by an agent, filed its bill against the Domestic Sewing Machine Company, a corporation created under the laws of Rhode Island, doing business in the city of Atlanta, by an agent, R. J. Wiles, the agent of said company, Alexander S. Abrams, Henry W. Grady and R. A. Alston, co-partners using the firm name of the Herald Publishing Company, and W. A. Hemphill and E. Y. Clark, co-partners, under the firm name of W. A. Hemphill & Company, proprietors of the Atlanta Constitution, a newspaper published in said city of Atlanta, making the following case:

Complainant is engaged in the manufacture and sale of sewing machines. On October 14th, 1872, the Georgia State Agricultural Society held its annual fair in the county of Fulton, and invited all persons interested in sewing machines to exhibit them at said fair, under the regulations established by said society, and promised to award a diploma to the manufacturer and proprietor of the best family machine, a diploma to the manufacturer and proprietor of the best manufacturing machine, and a diploma to the manufacturer and proprietor of the machine with the best attachments, said diplomas to be determined and awarded by a committee appointed by said so-

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ciety to inspect sewing machines and to award premiums. Complainant competed for each of the aforesaid diplomas. Many other machines were also presented, and amongst them the one manufactured and owned by the Domestic Sewing Machine Company. Said committee reported the machine of complainant to be the best family machine and the best manufacturing machine, and diplomas were awarded accordingly. Notwithstanding these facts the Domestic Sewing Machine Company has published in the Atlanta Herald, a newspaper owned and controlled by the Herald Publishing Company, and in the Atlanta Constitution, a newspaper owned and controlled by W. A. Hemphill & Company, that the said committee decided and reported that "the Domestic Machine, as a family machine, is the best." Complainant, for the purpose of denying such statement, published the report of the committee as it was rendered. The defendants then published that the report of the committee as set forth by complainant was untrue, and that said committee had reported that the Domestic Machine, as a family machine, was the best. The damages to complainant resulting from the aforesaid publication are inestimable. Prayer, that the writ of injunction may issue, restraining defendants from saying by publication or otherwise that said society did not award the first premiums to complainant for the best family machine, and for the best manufacturing machine. That the writ of subpoena may issue.

The defendants answered the bill, but their defenses are unnecessary to an understanding of the decision of the Court, and are therefore omitted.

The injunction was denied, and complainant excepted.

HILLYER & BROTHER, for plaintiff in error.

L. E. BLECKLEY; S. D. McCONNELL; J. M. CLARK & SON, for defendant.

Injunction attaches only to an admitted or legally adjudged property or right in plaintiff—admitted or legally adjudged to be interfered with or infringed by defendant: Adams' Eq., 217. No property can be acquired in words, marks or devices

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which indicate only the nature, kind or quality of the article in which a person deals: 2 Story's Equity Jurisprudence, 951 (*b.*) and note; High on Injunctions, 672. As to the rule in regard to trade marks, see *Ellis vs. Zeilin & Co.*, 42 Georgia, 91. The report of the committee on sewing machines, at the Fair of the Georgia Agricultural Society, vested no right of property in complainant that could be infringed by defendant: 2 Story's Equity Jurisprudence, 941, (note); Adam's Equity, 217; note 1, and authorities there cited; *Stokes vs. Landgraff*, 17 Barb, 608. Equity will not restrain a publication upon the ground merely that it is false and tends to injure business of the plaintiff; nor will it interfere to prevent merely criminal or immoral acts: 2 Story's Equity Jurisprudence, 948; High on Injunctions, 23, 689; *Wetmore vs. Scoville*, 3 Edward's Chancery Reports, 529. Injunction will not be granted in doubtful or new cases not coming within well established principles: 2 Story's Equity Jurisprudence, 859 (*b.*) The Constitution of the State of Georgia grants to every citizen the right to speak or write what he pleases, he being accountable for injuries sustained by others by reason of his abuse of this privilege: Constitution of Georgia, Article I. section 9.

McCAY, Judge.

A clear and definite statement of the exact thing sought for by this bill will, as it seems to us, justify the Judge in his refusal to grant the injunction. There is no complaint that the defendant is doing or publishing anything to induce the public to believe that the machine he sells is the same as the complainant's. So far as we have been able to examine them, all the trade-mark cases turn upon this: they declare that a man shall be enjoined from passing off his wares as the product of another man—from using devices to persuade the public that in buying his wares they are, in fact, buying wares guaranteed by the skill and reputation of a rival dealer: *Delewan vs. Clark*, 7 Blatch, 112; High on Injunctions, section 677. Again, this bill does not claim that the defendant is inter-

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fering with the complainant's right to the exclusive use of whatever credit the report of this committee gives him. His right to publish is unlimited. Indeed, the complaint is that the defendant does *not* publish the report. The true complaint of the bill, at last, is that the defendant has denied that the society gave to complainant the premium, and has asserted that in truth the society gave it to himself. It is not said that he is passing off his wares by putting complainant's mark on them, nor that he is publishing without authority a report which the claimant is alone entitled to publish, but that he is unblushingly denying the truth of complainants having gotten the prize, and claiming that he got it himself. He is not *taking* complainant's property—he is not *infringing* the plaintiff's right of property. He is denying—it may be falsely and injuriously denying—plaintiff's right to whatever credit the premium of the society gives. Will an injunction lie to prohibit such a wrong? It is admitted there is no precedent for such an injunction in England or America. This is itself a very strong argument against it. For many years prizes, premiums and medals have been a favorite mode of publicly declaring the excellence of wares of every kind, and prize shows and contests have been an every day occurrence for a century, both here and in England. The fact that no case can be found enjoining the denial of such a reward, having been given, is a strong proof that solicitors and chancellors have not deemed such a denial a subject for injunction. The general rule is that to get an injunction you must show the infringement of a *property* right.

It is well settled that an injunction will not be granted to restrain slander or libel of title or of reputation : 6 Simmons, 297; 11 Beavan, 112; 11 Simmons, 582. Not that it is not a wrong, not that the wrong might not be irreparable, but simply because Courts of chancery, in the exercise of the extraordinary powers lodged in them, have uniformly refused to act in such a case, leaving parties to their remedy at law.

The case made by the bill is one of words, which are untrue in fact, and which are calculated to injure the credit of

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complainant's business and advance the business of defendant. If a wrong capable of redress before the Courts at all, it comes more nearly within the definition of a libel or of slander concerning one's trade or business, than anything else. Equity, it must be remembered, will not enjoin every wrong. There are injuries done by one man to another which no law will remedy. Telling lies, unless those lies be of a peculiar character, is one of such injuries. But there are very many wrongs, wrongs recognizable and capable of redress at law, that yet are not such wrongs as a Court of equity will enjoin. Libel and slander, however illegal and outrageous, will not be enjoined. This is the settled rule: High on Injunctions, section 693; same, sections 23-28. The most that can be said of the conduct of the defendant is, that he is telling and publishing untruths—lies, if you will—calculated and intended to help himself and damage the complainant. To say that he may be enjoined from doing this, is to say that the writ of injunction may issue to restrain a libel or to stop slander. It is true that Courts of equity constantly refuse to lay down any absolute limitation to its power to issue this writ. But this only means that cases coming within the principles on which the Court has long acted are not beyond its power simply because the facts are novel or the injury peculiar. The principle is, that to authorize the writ there must be an irreparable, expected injury to a property right. It is a perversion of language to say that the complainant has a property right in *the truth* of the report. He has, perhaps, a right to the report, but a perversion of the truth, a claim that it is different from what it in fact is, can in no fair sense be called an infringement of his right of property in the report.

For these reasons we do not think the complainant entitled to an injunction.

Judgment affirmed.

HUBBARD VAN HORN, plaintiff in error, *vs.* JESSE J. BRADFORD, sheriff, defendant in error.

(TRIFFE, Judge, was providentially prevented from presiding in this case.)

Where a sheriff levies a mortgage execution upon the land of the defendant, but before the sale was notified that the defendant's wife had had a homestead set apart in the same, and an appeal had been taken to the Superior Court, the sheriff does not render himself liable to rule by postponing the sale until the plaintiff could obtain an order of Court directing him to sell the land if it was his duty to do so.

Homestead. Rule against sheriff. Before Judge JOHNSON. Muscogee Superior Court. May Term, 1872.

For the facts of this case, see the decision.

D. H. BURTZ; A. A. DOZIER; M. J. CRAWFORD, for plaintiff in error.

PEABODY & BRANNON, for defendant.

Cite 40 Georgia Reports, 298; 39 *Ibid.*, 252; 42 *Ibid.*, 542.

WARNER, Chief Justice.

The error complained of in this case was the refusal of the Court to make the rule absolute against the sheriff on the statement of facts disclosed in the record. The sheriff levied the mortgage *fi. fa.* on the land described therein as the property of the defendant, and advertised the same for sale; but before the sale thereof, was notified that the defendant's wife had applied for and had the land set apart as a homestead, for the benefit of herself and minor children, by the Ordinary; that an appeal had been taken from the judgment of the Ordinary allowing the homestead to the Superior Court. Under these circumstances he took the legal advice of his counsel as to his duty, who advised him to postpone the sale of the land until the present term of the Court, so that the plaintiff might obtain an order of the Court directing him to sell

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the land if it was his duty to do so, and so notified the plaintiff. The plaintiff offered to indemnify him if he would proceed to sell the land, which he declined to do; had no intention to disobey the order of the Court, but only desired to be protected in the discharge of his duty as sheriff. The land is still subject to be sold under the levy whenever the homestead question shall be settled adversely to the applicant therefor, and whenever the Court shall so order. In view of the facts contained in the record of this case, we affirm the judgment of the Court below in discharging the rule against the sheriff.

Judgment affirmed.

DANIEL F. GUNN, plaintiff in error, vs. WILLIAM H. CALHOUN, defendant in error.

The verdict in this case is not contrary to the evidence, except as to the amount of \$150 00 per annum, found for the complainant against the defendant, for four years' use of the land in controversy, the profits derived from such use not exceeding the just claim of defendant against complainant, and, therefore, if the complainant will write off this amount from his verdict the judgment should be affirmed, otherwise reversed. (R.)

New trial. Verdict. Practice in the Supreme Court. Before Judge COLE. Houston Superior Court. June Term, 1872.

This case arose upon a bill filed by William H. Calhoun against Daniel F. Gunn, setting up that Calhoun having been in possession of certain lands under bond for titles from one Griffin, the same were sold at sheriff's sale in 1856, under an execution in favor of Griffin, for the purchase money, Griffin having filed a deed; that an agreement was made before the sale between Calhoun and Gunn that Gunn should buy the land for Calhoun, he (Calhoun) to repay Gunn what he should pay, with interest at ten per cent., Calhoun to retain posses-

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sion; that under this agreement Gunn had bid off the land for \$1,580 00. The bill charged that at various times afterwards Calhoun had paid moneys to Gunn in discharge of his agreement until the whole amount, with interest, was repaid. That Calhoun had retained the possession, had improved the land by clearing and building, and had kept the quiet possession from 1856 to 1868; that Gunn, in December, 1868, had ousted him as a tenant holding over, he (Calhoun) not being able to give the bond required to resist the warrant procured against him as his tenant. The bill prayed that Gunn should make titles and account for the rents from 1868.

The answer was waived. The defendant set up a denial of the agreement—set up that the complainant was, at the time of the sale, in his debt, under a mortgage on the land for over \$1,000 00; that he had bought the land for himself and as his own; that after the sale he had agreed to rent the land to complainant for ten per cent. per annum on the amount of the bid, the bid being \$1,540 00; that defendant had paid him certain moneys before and during and since the war, but the same were in discharge of the mortgage debt and the rent.

Both the parties were sworn as witnesses, and both sustained their own statement of the case, Calhoun admitting the mortgage on its being presented to him, but insisting that his payments, especially the payments of \$500 00, \$1,000 00 and \$200 000, were made by him on the debt for the land. He also proved that he had built upon the land and cleared a good deal of it, and that Gunn had never said anything to him about rent until the warrant in 1868. It was also proved by Calhoun himself that the rent was now worth \$2 00 per acre, and that over three hundred acres were cleared.

It was in proof that Calhoun had been in possession from 1856 to 1868, giving the land in for taxes and claiming it as his own. The evidence as to the payments was conflicting. It was also proven by a witness that Calhoun, for several years before 1868, had rented out the land to other persons—the tenants never hearing of any claim by Gunn.

The jury found for the complainant, and decreed that Gunn

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should make the titles and pay Calhoun \$150 00 per annum for four years, for his use of the land.

The defendant moved for a new trial upon the following grounds :

1st. Because the Court erred in refusing to allow counsel for defendant to ask complainant when on the stand as a witness, the value of the \$1,000 00 in Confederate money which he paid in 1864.

(NOTE BY THE JUDGE).—"I refused this because the defendant had received it and credited that amount to complainant."

2d. Because the Court erred in charging the jury, "that if they believed from the evidence that the complainant and the defendant entered into a parol agreement before, or at the sheriff's sale, for Gunn to bid off the land for Calhoun, and for Calhoun to remain in possession until he repaid to Gunn the purchase money with interest, and if Gunn bid it off and allowed Calhoun to remain in possession according to this agreement, and if Calhoun had repaid to Gunn the purchase money with interest according to contract, or a considerable part of it, then they should find the land for complainant, first requiring complainant to pay whatever they might believe was still due, if any, on the land to Gunn, and that they should do this whether the mortgage debt, or any other debt owing by Calhoun to Gunn, if such existed, had been paid.

3d. Because the verdict is contrary to law and the evidence.

The motion was overruled, and defendant excepted upon each of the aforesaid grounds.

WARREN & GRICE; LANIER & ANDERSON, for plaintiffs in error.

S. HALL; DUNCAN & MILLER, for defendant.

McCAY, Judge.

This case turns almost exclusively upon the facts. The principles of law involved are undisputed. Taking this as a contract, not good because it is in parol, unless it have been

partly performed, it is admitted that before specific performance of it will be decreed, its terms must be plainly made out, such performance by the complainant must be proved as would make it a fraud for the defendant to repudiate it, and the Court must be satisfied from the evidence that the contract was in fact made. It seems to us that these conditions are fully complied with. Indeed the evidence that there was such a contract as the bill sets forth is very strong. The oath of the complainant is, it is true, met by the denial of the defendant, but the circumstances furnish proof that, in our judgment, makes the complainant's evidence largely preponderate. That the complainant should have remained in possession for twelve years, without any passages of any kind between the parties, as landlord and tenant, is very strange, if defendant be right, and this is admitted even by the defendant himself, for he does not even claim that during all that time he ever spoke on the subject of tenancy or rent. True, he says he considered the balance of the Confederate money left after paying the mortgage, as a credit on his debt for rent, but he did not tell this to the complainant. It seems, too, incontestible that the complainant was clearing the land, building upon it, and openly claiming as his own, for twelve years, and this with defendant a close neighbor. It is also in proof, and this is to our minds evidence very hard to overcome, that complainant for several years before 1868, did not himself live upon the land, but rented it to third persons. Is it conceivable that the owner of land will lie quietly by and permit one whose only right to it is that of a tenant—a tenant, too, who regularly neglects to pay rent—to rent it out to third persons, year after year? And that the possession was quiet is proven not only because he did not retake the possession, but because the witness says he never heard of any claim by the defendant.

As to the payments, it is true the evidence is not so satisfactory. The complainant and the defendant agree neither as to the amount nor the object of these. If the complainant's story as to the receipts and the destruction or detention of them by defendant be true, the presumption is all in favor of

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full payment. The entries on the note by defendant, and especially the pencil memoranda, as well as his failure to call the witness who was present when the credit was made, are not satisfactory to our mind. The memory of the complainant, old as he is, cannot, doubtless, be depended upon as to dates and amounts, as is apparent from the fact that he only remembers a payment of \$500 00 anterior to the Confederate money payment, while the defendant's own credit on the note itself shows that previously to that time he had made payments which entitled him to a credit on the mortgage of the date of 19th February, 1856, of \$1,091 00. The mortgage debt was for \$, due 18th November, 1854. A payment dated 18th February, 1856, would reduce this debt, including the \$40 00, to a little over \$200 00. Now it is strange that the defendant should take \$1,000 00 afterwards from complainant and put that as a credit on this note, saying nothing of the overplus, and it is equally strange that this credit of 18th of February, 1856, should have been dated back to that date. Why do this? All the payments of which it was made up were, as defendant says, made after 1st January, 1855. Why fix 18th February, 1856, as a date for the credit. For convenience of counting interest? The note was due 18th November, 1854. There is no harmony between 18th November and 18th February, no convenience in counting interest on a note due 18th November, 1854, procured by having the credit 18th February, 1856. To say that this is the result of the average of the several payments is also strange. How few people, if called upon to put several payments on a note, would average them according to the rule, and put them in the note at the date produced by the average. Nor does the memorandum in pencil enlighten us. It is, on its face, an after thought. It is suspicious. Altogether we cannot help thinking this \$1,091 00 credit was an independent payment which the old man had made, and thus it, with the very existence of the debt, has passed out of his memory.

Nor are we prepared to say that the complainant is not entitled to the full nominal value of the Confederate money.

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Defendant received it as a *payment*. Complainant says generally; defendant says upon the mortgage and rent, though he admits he did not specify any other debt than the mortgage debt; and, under the facts, we should not interfere with the verdict, though it be based on the idea that this money is to be taken as a credit generally, at its nominal value. When it was tendered as a payment he had a right to refuse it. He did not refuse, but took it—took it as money. Is it a harsh presumption to say he took it as everybody then took it—for what it purported to be—money according to its face value? We think not.

But assuming, as we feel bound to do under the evidence, that the contract is fully made out, and that there was a strong case of part performance, if not full performance proven, there is left to make up the balance the use of the place from 1868 to the trial. Under the proof *that might be* from \$150 00 to \$600 00—a large margin. We think the evidence of the payment of both debts is not made out except by the use of this off-set. The jury have evidently given the complainant what they thought the full value of the premises for four years. We think the evidence does not sustain this; that it will take all of this to pay the complainant in full, and we therefore put our affirmance on condition that the plaintiff write off this money verdict.

Judgment affirmed.

AUGUSTUS H. LEE, plaintiff in error, vs. WILLIAM W. CLARK, executor, defendant in error.

When A filed a bill in equity against C's administrator, alleging that he (A) and B had, during the late war, traded lands; that B was at the time indebted to C for a part of the purchase money of the land, but C was refusing Confederate money, so that the debt could not be paid; that for this reason A only gave to B his bond for titles to the land he let him have; that B afterwards traded the land he got of complainant to D and transferred the bond; that shortly after this,

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complainant received a message from C, then in life, that he might safely make a deed to D, as he (C) was now willing to take Confederate money from B for his debt; that knowing positively that B had the money and was ready to pay, he, (A) in consequence of this message, made titles to D and took up his bond; that he is informed that B soon after tendered the Confederate money to C, who refused it; that C had died, and his administrator, the defendant, was proceeding to levy his judgment, which was a judgment on the foreclosure of a mortgage on the land. The bill prayed a perpetual injunction against the mortgage, and a temporary injunction until the trial. The Court granted the temporary injunction. C's administrator, the defendant, answered the bill, denying, on his information and belief, the sending of the message and the tender of Confederate money, and moved to dissolve the injunction and to dismiss the bill for want of equity. The Court dissolved the injunction and dismissed the bill:

- Held*, 1. That as the statements of the bill, on which its equity depends, were not stated as in the complainant's own knowledge, and was not supported by any affidavits of their truth, the Court did not err in dissolving the injunction.
2. That there is equity in the bill, for which complainant has no remedy at law, and that it was error to dismiss the bill.

WARNER, Chief Justice, dissented.

Equity. Injunction. Before Judge GREENE. Newton county. At Chambers. July 4th, 1872.

Lee filed his bill against Clark, as the executor of William D. Conyers, deceased, containing substantially the following allegations:

Complainant and one Turner Horton each owned tracts of land in Newton county. They agreed to exchange. Before this contract was executed, Horton informed complainant that he purchased his land from William W. Clark; that a portion of the purchase money was still unpaid, and that Clark had transferred his claim to the same to William D. Conyers. Under these circumstances, complainant declined to execute a deed to Horton to his (complainant's) land, but instead thereof, made and delivered to him a receipt, in the nature of a bond for title, conditioned to execute a title deed so soon as the balance of the purchase money due upon the land for which he had contracted, should be paid. Complainant, knowing that Horton was, at the time, amply able to discharge said liability,

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accepted his deed to the land for which he was exchanging, and went into possession of the same. Shortly after the execution of the aforesaid receipt by complainant, Horton traded the lands specified therein to Lewis Zachary and transferred to him said receipt. Complainant has been informed and believes, and so states, that the difficulty in reference to the payment of the balance of the purchase money was, that Conyers would not accept from Horton in payment thereof what was then the only currency of the State, viz: Confederate treasury notes. Subsequently to this, complainant received a message from Conyers, that he would accept from Horton Confederate money in payment of the said claim, and that he (complainant) might safely execute a deed to Zachary, to whom Horton had transferred the receipt as aforesaid. Relying upon this promise, and knowing that Horton had the money on hand, and that he had been exceedingly anxious to pay off said balance, complainant, without hesitation, executed and delivered to said Zachary a deed to said lands, and took up and destroyed the aforesaid receipt. Complainant has been informed and believes, and so states, that immediately after he had executed the deed as aforesaid, said Horton tendered to said Conyers Confederate money sufficient to pay off and satisfy the balance of said unpaid purchase money on the lands conveyed to complainant. He believed that the whole matter had been settled, and never heard anything to the contrary until October 29th, 1868, when he received a notice from the sheriff of Newton county that he had levied a mortgage execution, in favor of William W. Clark against Turner Horton, which had been transferred to William D. Conyers, upon the lands conveyed to complainant by said Horton. On investigation, complainant discovered that there was such a mortgage on record, bearing date December 3d, 1859, and covering the premises described; that a petition for foreclosure was filed at the March term, 1860, of Newton Superior Court, and at the next succeeding term a rule absolute issued. Complainant would never have executed a title to Zachary to the lands conveyed by him, but for the assurances of Conyers, upon the

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faith of which he acted. The mortgage execution has no entry thereon from the third day of October, 1860, the date of its issue, to the ninth day of October, 1869. Complainant has filed his claim to said property, and the case will be pressed to trial at the next term of Newton Superior Court by Clark, as executor of Conyers, unless restrained by an order of this Court. Prayer, that the defendant be enjoined from the further prosecution of said levy and from pressing said claim case to trial until the further order of the Court; that said mortgage execution may, by decree, be perpetually enjoined from proceeding against the property of complainant; that the writ of injunction may issue.

The Chancellor sanctioned the bill and the writ of injunction issued.

The answer of the defendant, on his information and belief, denies that Conyers ever sent any message to complainant that he would receive Confederate money for the balance of the purchase money due on the land; denies that Horton ever tendered to Conyers Confederate money in payment thereof; denies that Conyers ever declined to receive Confederate money in payment.

The defendant moved to dissolve the injunction and to dismiss the bill. The Court sustained both motions, and complainant excepted, and now assigns said ruling as error.

J. J. FLOYD, for plaintiff in error.

CLARK & PACE, by PEEPLES & HOWELL, for defendant.

McCAY, Judge.

1. There was no error in dissolving this injunction. This Court, in the case of *Jones et al. vs. Macon & Brunswick Railroad*, 39 Georgia, 138, has held that to justify the use of this extraordinary writ the statements of the complainant must be positive, and within his own knowledge, or if he cannot say this, but relies on information and belief, he must bring with him the sworn statements of those who do know. And this

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is only a reasonable and proper requirement. The whole equity of this bill turns upon the message received by the complainant from Dr. Conyers. The bill does not say this message was sent by Conyers within the personal knowledge of the complainant. Indeed the inference is rather to the contrary. This brings the case within the decision referred to, and the injunction ought never to have been granted without other evidence.

2. But we are clear there is equity in the bill. It alleges that the complainant received a message from Dr. Conyers that he might safely make the deed, as he would take Confederate money from Horton; that as he knew Horton had the money, and was anxious to pay it, he did make the deed. True, it is not stated positively that Dr. Conyers sent the message, nor is any precise date stated. But the other facts stated show when the exchange of lands was made, and it is said this occurred shortly after. As to the want of a positive statement, that it is true, is a good reason why the temporary injunction should not be granted. But does that make the bill subject to demurrer? The demurrer admits as true all that is stated. It therefore admits that complainant "received a message" from Dr. Conyers as stated. Could he have received the message if it had not been sent. If I say I received a message from A, and he comes into Court and admits I did so, does he not admit that he sent it? And if it be proven on the trial that complainant did receive such a message from Dr. Conyers, no jury would hesitate to decree on that proof, since it is impossible that he should receive such a message unless it was sent. If such a message was sent to complainant by Dr. Conyers, and complainant received it and acted on it, we think that discharged the lien of the mortgage. Nor is there on *this* contract (for a contract it is, if the facts be proven, since it was a proposition of one, on which the other acted to his own hurt,) any remedy at law. With this contract Horton had nothing to do. As to him Conyers might repudiate it, but as to complainant he could not, since he had acted on it, and put himself in a new and not so good

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a position. He has no remedy against anybody on this contract, except the very remedy he asks, to-wit, the release of his land from this lien.

We think, therefore, there was equity in the bill, and the Court erred in dismissing it.

Judgment reversed.

TRIPPE, Judge, concurred, but furnished no opinion.

WARNER, Chief Justice, dissenting.

This was a bill filed by the complainant against the defendant, praying for an injunction to restrain the sale of certain described tracts of land under a mortgage *fi. fa.* which had been levied thereon. The injunction prayed for was granted, and afterwards, a motion was made on the filing of defendant's answer, to dismiss the complainant's bill for want of equity, and to dissolve the injunction. On the hearing of this motion the Court sustained the demurrer to the complainant's bill, and dismissed it, whereupon, the complainant excepted. The alleged grounds of equity in complainant's bill are, that he was the owner of a settlement of land in Newton county, known as the Hammock, Gill and Corly place; that one Turner Horton was the owner of a settlement of land in said county, known as the Whatly place; that on the day of, 18..., the complainant and Horton agreed to exchange the aforesaid settlements of land; but before the deeds were executed, Horton informed complainant that he had purchased his settlement of land from Clark, and that a part of the purchase money due therefor was unpaid; that Clark had transferred his claim to the money due therefor to Dr. Conyers, then in life, but now dead; complainant then declined to execute a title to Horton for his settlement of land, but instead thereof, executed to him a receipt in the nature of a bond for title, conditioned to make a title when the unpaid purchase money due for the land should be paid by Horton. Complainant taking a deed from Horton for his settlement of land, knowing, as complainant alleges, that

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said Horton was fully able to meet and discharge said liability for the unpaid purchase money, went into the possession of the land, and has continued in the possession of the same up to the present time. Shortly after the complainant had executed and delivered his bond for title, as before stated, to Horton, the latter sold the land described therein to Zachary, and transferred to him his said bond for title. The reason why the purchase money had not been paid by Horton for the land, the complainant states from information and belief, was that Conyers was unwilling to take Confederate money for the debt, but complainant believed he had protected himself by retaining the title in himself to the land sold to Horton until the purchase money for the land bought by him from Horton should be paid. Complainant alleges that, sometime about the day of, in the year 1860, he received a message from Conyers that he would receive from Horton Confederate money in payment of said claim, and that he, complainant, might safely execute a deed for the land to Zachary, which he had sold to Horton, and which the latter had sold to Zachary; that relying on this message from Conyers, and knowing that Horton had the money in hand and was anxious to pay it, he did, on the day of, 18..., execute a deed for the land to Zachary and took up his bond for title, and complainant has been informed and believes, that immediately after he had executed the deed for the land to Zachary, Horton tendered to Conyers Confederate money sufficient to pay the principal and interest due on the aforesaid claim, and complainant believed the whole matter was settled until the 29th day of October, 1868, when he was notified that the sheriff had levied a mortgage *fi. fa.* on the land, which mortgage had been given by Horton to secure the payment of the purchase money for the land, and had been duly recorded.

Such are, substantially, the allegations in the complainant's bill. If the allegation in the bill is to be literally construed, that the message from Conyers that he would take Confederate money was received by the complainant in 1860, then it was before Confederate money was issued; but if it was in-

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tended to mean that it was in 1860, 1861, 1862, 1863, 1864, or 1865, or in some one of those years, then the time is too uncertain and indefinite, because it would be much more improbable that Conyers would have sent a message that he would take Confederate money in 1864 or in 1865, than in 1862 or in 1863. But there is no allegation that he refused to take the Confederate money when Horton tendered it to him at any time. Who the messenger was is not stated, whether white or colored, male or female, and it is a significant fact, that the affidavit of that messenger was not produced on the motion to dissolve the injunction ; but after all, the complainant's allegations only amount to this, that *somebody* told him, at *some time*, that Conyers would take Confederate money for Horton's mortgage debt, and that he might safely execute a deed to Zachary. Whether Conyers ever told anybody that he would do so, we do not know, and to charge Conyers, after his death, with having discharged his mortgage lien on Horton's land, upon the mere say-so of a nameless messenger, would be without a precedent in the history of judicial proceedings. The allegation that the complainant received the message from Conyers, as stated in the bill, necessarily implies that he must have received it through a messenger ; in other words, that messenger told the complainant what Conyers said, but that nameless messenger may not have told the truth in relation to the matter, and Conyers would not be bound because that messenger told the complainant he had sent such a message. As to Conyers, it was only the declaration of some third person ; as to the complainant, it was only hearsay evidence, and nothing more, especially as the complainant does not allege that he believed it to be true. The allegation that the complainant received the message *from Conyers*, necessarily depends on the fact that the nameless messenger told him so. In other words, I received the message *from Conyers* because the nameless messenger said so, or told me so, and that is all that allegation.

Besides, this mortgage debt due by Horton for the purchase money of the land sold by him to the complainant, was an

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incumbrance on the land at the time of the sale, and there is nothing in the bill which goes to show that the complainant has not an ample common law remedy on his deed from Horton to him for the land—no charge of *insolvency* on the part of Horton. If the complainant chose to act upon the information of this nameless messenger, which he does not even allege he believed to be true, without inquiry of Conyers as to the *truth* of his statements, and make a deed to Zachary, it was his own fault, and a Court of equity will not assist him, the more especially as he has his remedy on Horton's deed to him, if the land purchased from Horton should be made subject to the payment of the mortgage debt. Horton is the real party interested to have the mortgage lien removed from the land, instead of the complainant. The allegations in the complainant's bill are to be construed most strongly against him, especially when the process of injunction is prayed for, and if he cannot recollect as to the time when material transactions took place, the Court will not recollect it for him.

The demurrer to the bill only admits such facts as, in the judgment of the law, would entitle the complainant to the relief which he seeks. Would the allegations in the complainant's bill, if proved at the hearing as therein set forth, entitle him to a decree setting aside and canceling Conyers' mortgage lien on Horton's land? If they would, then the injunction should have been retained, but if they would not, and, in my judgment, they would not, then there was no error in the Court below in sustaining the demurrer, and dismissing the complainant's bill for want of equity.

E. E. BYCE, plaintiff in error, vs. A. E. ROSS, administrator,
defendant in error.

When an action of trover was called for trial, and the plaintiff's attorney stated to the Court that a case before it on the docket was ready for trial, both parties being ready, and asked that the older case be taken up, as it being early on the first day of the term, neither his

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client nor his witnesses were yet present ; that various witnesses, as appeared by the docket, had been subpoenaed, and that, as he was informed, they would prove certain facts which would fully sustain the suit, and the Court failing to find said older case on the docket, though it was in fact there, refuse to delay the case or continue it, (the docket showing two continuances already by the plaintiff,) and dismissed the suit; and afterwards, on the next day, the plaintiff moved to reinstate the case, stating that he was ready for trial; that he had been detained at home the previous day until late by an unusual storm, which had blown down his fences, and he was compelled to put them up or lose his crop, and that as soon as he could do this he had hurried to town; was told by his attorney to get up his witnesses, as his case might be called at any time; that he had forthwith gone after one of them at his house in town, and during this, his temporary absence, his case was dismissed, that he had now his witnesses present, who would prove certain facts making a full support of his action :

Held, That the Court erred in refusing to reinstate the case.

Practice. Before Judge HARVEY. Floyd Superior Court. July Term, 1872.

This case was called for trial at about two o'clock P. M., on the first day of Court. The plaintiff not being present, his counsel called the Court's attention to another case which preceded it upon the docket, and which was ready for trial. The Court glanced over the docket, but could not find the case referred to, though it was in fact there, and required the plaintiff's counsel to announce. Counsel for plaintiff moved for a continuance on the account of the absence of material witnesses, who were regularly subpoenaed, by whom, as he was informed by plaintiff, he could prove certain facts, which were stated to the Court, and which would have supported plaintiff's case. The Court refused to continue the case because the docket showed two continuances already charged to plaintiff, and counsel for plaintiff excepted.

Counsel for plaintiff then appealed to the Court and to counsel for defendant, to pass the case for a short time or until the next morning, and he would be ready for trial. Counsel for defendant insisted upon having the case dismissed, and so the Court ordered. Whereupon, counsel for plaintiff excepted.

On the next day counsel for the plaintiff presented to the Court the following affidavit, and moved for leave to reinstate said case :

"In person came before the undersigned E. E. Byce, plaintiff in the cause above stated, who, on oath, says that on Sunday night, the 14th instant, a storm blew down a large portion of his fence around his farm, exposing his growing crop to the depredations of cattle, horses, etc.; that on Monday forenoon, 1st instant, deponent was compelled to remain at home and put up his fence, or suffer his crop to be greatly damaged if not destroyed; that he had no other person to attend to putting up the fence; that so soon as he got his fence put up, the weather being bad, he came to Rome—reached the city about two o'clock P. M., and being told by his attorney that his case might be called up at any time, deponent went in search of S. B. Crane, one of his witnesses in the case, and in search of him, went to inquire for him at Stone & Bones' warehouse, on Broad street, at which house said Crane had recently been working, said Crane living in Forestville; that after searching in vain for said Crane, deponent came to the Court-house, and learned that his case had been dismissed. Deponent says that he remembers that his case was continued one time on account of the sickness of one of his witnesses, Jesse P. Ayres, and to the best of his recollection said case was continued at another time on account of the sickness or absence of his attorney, E. N. Broyles. Deponent says he is well satisfied that he has a good and legal cause of action; that he has for long years been diligent in attending Court on the case, with his witnesses; that the case was passed at several Courts because not reached, and was postponed several times by death of defendant, Morris, and the time necessary for making new parties, which plaintiff had done. Deponent says he has long since had several persons duly subpoenaed, to-wit, Jesse P. Ayres, Henry Burns, Shade Farmer, S. B. Crane, etc.; that he expected them to be present to testify on his behalf on the trial; that they were absent without his consent or ap-

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proval, and had they been present his attorneys could have gone on to trial. Deponent says he expected to prove by J. P. Ayres that William Morris, at the time he swapped the lot of land to plaintiff for the two mules, had no title to the land, and that Morris then knew it, and to prove the same points by Farmer and Burns, and by Crane that plaintiff bought the two mules specially to let said Morris have in exchange for the said land, and by Fincher, that plaintiff, on discovering the fraud, went to said Morris and demanded a rescision of the contract, and the return to him of the mules, and a refusal by Morris to do so, and an admission by Morris that if he did not make a good title to the land he would return the mules.

“Deponent makes this affidavit in order and for the purpose of getting his case reinstated, that it may be tried on its merits. . . . (Signed.) E. E. BYCE.”

The Court refused to allow the case to be reinstated, and counsel for plaintiff excepted.

Error is assigned upon each of the aforesaid rulings.

E. N. BROYLES ; A. R. WRIGHT, for plaintiff in error.

ALEXANDER & WRIGHT, for defendant.

McCAY, Judge.

It is with great reluctance that we interfere with the discretion of the Circuit Judge, in the conduct of the business in his Court. But this is a very hard case, and as the plaintiff has, as we think, without any fault of his, been turned out of Court, we feel constrained to reverse Judge HARVEY's ruling. It appears from the plaintiff's affidavit, that he was detained at home much of the day by providential cause, and that as soon as he got to the Court-house, he went with the activity and industry of a vigilant suitor, to get his witnesses into the Court-house. Had the Judge known when he dismissed this case the facts stated in the affidavit, we cannot think he would have refused to lay this case aside until the plaintiff could come in. The case was not in its order. True,

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whilst the law requires cases to be tried in the order, the Judge may, in his discretion, for the progress of business, alter this order. Still the order of cases is a fact. The case at bar was not in its order. An older case was ready for trial. The Judge failed to find it on the docket, and, using the discretion vested in him, he called this case. That was well enough ; but when he afterwards found there was, in fact, such a case, and he had inadvertently missed it, and the plaintiff in this case comes forward ready for trial, with the excuse he presents, we feel that the Judge ought to have reinstated the case, dismissed, as it in fact was, by a mistake of the Court, in not finding the older case.

Judgment reversed.

WILLIAM V. COLLIER *et al.* plaintiffs in error, vs. THEOPHILUS SAPP, administrator, defendant in error.

Where a plaintiff sues for the balance due on notes for the purchase money of land, and the jury, under the Relief Act of 1868, render a verdict returning the land to the plaintiff, requiring him to pay to the defendants \$3,553 27, upon which a judgment was duly entered, and the defendants, having obtained a *supersedeas*, carried the case to the Supreme Court, but withdrew the writ of error on the calling of the case in that tribunal :

Held, That on a bill filed by the plaintiff stating the aforesaid facts, and that the defendants had remained in possession since the rendition of said judgment, receiving large rents and profits ; that the plaintiff had been compelled to pay a large amount as taxes upon the property to prevent its sale ; that the defendants had procured an execution to be issued on said judgment and levied on said land ; that plaintiff was ready to pay the amount required by said judgment after deducting the rents and profits, and taxes expended as aforesaid, it was not error in the Chancellor to enjoin said execution, and to appoint a receiver to take charge of said land until the final hearing of the case.

Injunction. Receiver. Before Judge HARRELL. Muscogee county. At Chambers. October 24th, 1872.

For the facts of this case, see the decision.

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M. H. BLANDFORD; B. A. THORNTON; PEABODY & BRANNON, for plaintiffs in error.

R. J. MOSES; L. T. DOWNING, for defendant.

WARNER, Chief Justice.

The complainant filed his bill against the defendants, praying for an injunction and the appointment of a receiver. The Court granted the injunction and appointed the receiver, in accordance with the prayer of the complainant's bill; whereupon, the defendants excepted.

The record of this case exhibits an anomalous state of facts. In June, 1860, the complainant's intestate sold to the defendants a plantation containing twelve hundred and five acres, and executed to them a bond to make a title thereto when they should pay certain described notes given for the land. The defendants went into the possession of the land, and have continued in possession thereof, either by themselves or tenants. Suit was instituted against the defendants for the amount due on the notes, when they pleaded thereto the Relief Act of 1868, and upon the trial the jury found the following verdict: "We, the jury, return the land to the plaintiff, and the plaintiff pay the defendants the sum of \$3,553 27," on which verdict a judgment was entered by the Court. The defendants then sued out a writ of error to this Court, obtained a *supersedeas* on filing an affidavit of their inability to give security on account of their poverty, then withdrew their writ of error from this Court, whereby the judgment of the Court below was affirmed. The complainant alleges that he has been ready at all times to perform what was required of him by said judgment, and now offers to do so.

The complainant also alleges that he has been compelled to pay the sum of \$114 20 for taxes to prevent the land from being sold by the sheriff therefor, and that the defendants have remained in possession of the land by themselves or tenants, and received large sums for the rents and profits thereof,

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and have had an execution issued for the amount which complainant was to pay under the before recited verdict and judgment and levied it on said land. The complainant claims in his bill that the defendants shall account for the rents and profits of the land, and that the same shall be deducted from the principal and interest, which he is required to pay under said verdict and judgment, and also the taxes which he has been compelled to pay on the land, inasmuch, as the defendants are *insolvent*. Who was bound to pay the taxes on the land was not discussed before us, and we express no opinion in regard to that question. There were affidavits filed in relation to the value of the rent of the land, which are conflicting as to what the rent was worth. In view of the peculiar facts of this case, we find no error in the Court below in granting the injunction, and appointing a receiver until the final hearing of the cause on its merits, in order that the respective rights and equities of the parties may be considered and adjudicated. Under the Constitution and laws of this State the Superior Courts, or the Judges thereof, are clothed with the authority and discretion to grant, or to refuse to grant, injunctions, and it is a mistake to suppose that this Court will interfere to control that discretion, unless some well established rule of law or principle of equity has been violated.

Let the judgment of the Court below be affirmed.

BENJAMIN STRIPLING *et al.* plaintiffs in error, vs. D. M. STRIPLING *et al.* defendants in error.

When a suit was brought against the administrator of A, charging that A, during his lifetime, had, as administrator of complainants' father, bought the lands of the estate at his own sale at less than their value; that the lands had since A's death been distributed to his heirs, and were now in the hands of B and C, as purchasers from said heirs with notice. The bill prayed that the deeds be canceled, and the lands be delivered up; or, if this could not be done, that the administrator of A

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account for their true value, as well as account generally to complainants for the devastation of his intestate as administrator of complainants' father. On the trial the defendant offered to prove that the land brought its true value, and that the sale was fair, and this evidence the Court refused to permit :

Held, That, as one object of the bill was to recover the true value of the land, this was proper evidence, and that as the jury had by their verdict, failed to cancel the deeds and return the land, but found a money verdict, a new trial ought to be granted for this error of the Court.

Administrator's sale. Evidence. Before Judge COLE. Houston Superior Court. May Term, 1872.

D. M. Stripling, F. M. Stripling, Mary J. Shepard, formerly Mary J. Stripling, and William Stripling, Julia Stripling and John M. Stripling, minors, who sue by their next friend, H. T. Ball, all children of Moses Stripling, deceased, filed their bill against Benjamin Stripling, administrator of Thomas Stripling, deceased, Robert Stripling, Sarah A. E. Gray, formerly Sarah A. E. Sandefer, Daniel F. Gunn and Wiley Lev-erett, making the following case :

In the year 1862 or 1863, Moses Stripling died intestate, leaving a large amount of personal property and three hundred and ninety acres of land, situate in the county of Houston, and a lot of wild land, in the county of Dooly, the number of which is not now remembered. Letters of administration were issued to Thomas Stripling, who took possession of the entire estate. Said administrator, taking advantage of the absence of complainants, D. M. and F. M. Stripling, in the army, of the ignorance of their mother, who was unable to read or write, and of the minority and want of experience of the remaining complainants, did, to the great injury of the estate of the intestate, and for the purpose of accomplishing his own fraudulent ends, transfer all of the personalty to his own residence, and there sold the same. In furtherance of the same fraudulent purposes, said administrator, by virtue of an order of the Court of Ordinary of Houston county, obtained upon false and fraudulent representations, did sell the said three hundred and ninety acres of land, saving and except the dower

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therein. This sale was not made for the purposes of distribution, but in order to afford the said administrator an opportunity of purchasing the same.

On the first Tuesday in December, 1863, said land was exposed to sale and bid off by James M. Davis at about \$28 00 per acre, for the said administrator, who accordingly made a deed to the purchaser in his representative capacity, and said purchaser subsequently, on the same day, conveyed said property to him. The notes and accounts were more than sufficient to pay all the debts outstanding against the estate. Soon after said sale, and before said Thomas Stripling had fully administered said estate, he died, and Benjamin Stripling was appointed his administrator, and with a full knowledge of all the aforesaid facts, took possession of all the unadministered property of the estate of Moses Stripling, and also of said land. In the settlement of the estate of said Thomas, one hundred and fifty acres of said land was set apart to Robert Stripling, and the remainder to Sarah A. E. Sandefer, now Sarah A. E. Gray, children and heirs-at-law of said Thomas. Robert Stripling sold his share to Wiley Leverett, who is now in possession thereof. Mrs. Gray, or her husband, sold her share to Daniel F. Gunn. Both purchasers bought with full notice of the facts aforesaid. The land is of the value of \$5,000 00, and of the yearly value of \$500 00 for rent. Robert Stripling and Sarah A. E. Gray are insolvent.

Prayer, that Benjamin Stripling be required to account for all there may be due by the estate of Thomas Stripling to that of Moses Stripling. That the deed from Thomas Stripling, administrator, to James M. Davis, conveying said three hundred and ninety acres of land, and all subsequent deeds to the same, be canceled, and said land be restored to complainants. That a full account of the yearly value be taken, and that the persons receiving the same be required to pay the amount over to complainants.

The answers of the defendants are unnecessary to an understanding of the decision of the Court.

James M. Davis was introduced as a witness for complain-

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ants, and sustained, substantially, the allegations of the bill. Upon cross-examination, defendant's counsel proposed to ask the witness the following questions: If the sale of the said land was not fair? If it sold for its full value? If it was not the purpose and object of Thomas Stripling to make it sell for its full value? Upon objection made, the Court excluded said questions and the answers thereto, and defendants excepted.

The jury returned a verdict for the complainants "for \$1,400 00, with interest from December 1st, 1863, which sum is to be recovered from the estate of Thomas Stripling, deceased."

The defendants assign the aforesaid exclusion of testimony as error.

WARREN & GRICE, for plaintiffs in error.

DUNCAN & MILLER; B. M. DAVIS, for defendants.

MCCAY, Judge.

We are not fully satisfied as to what the jury meant by this verdict. Even assuming that the answer in response to the complainant's interrogatories is to be taken as a plea of *plene administravit*, it can hardly be supposed that, under the proof, the jury intended either to find against that plea or to find simply *de bonis testatoris*, since either verdict would be contrary to the truth, as it would be based on an admission of assets, which is flatly denied. Nor is the verdict against the *administrator* at all. True, it says the money is to be collected out of the *estate* of Thomas Stripling, but that may mean that his heirs ought to pay it; we are inclined to think that is what the jury meant, since, whilst it would be very right for such heirs to pay it, it is not right if the administrator has paid out the whole estate without notice of this claim, that he should be personally responsible. But we think there ought to be a new trial, because the Judge erred in ruling out the evidence as to the value of the land at the time of the sale. This bill has two aspects, one to follow the land, the other to charge the original administrator with its value, in case it has

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passed out of the complainants' reach. So far as the claim to have the land back is concerned, its value then has no relevancy, since the administrator had no right to buy, at least the complainants have a right to elect to follow the land whether it brought its value or not. But on the other issue, to-wit: the right to have the true value of the land accounted for, in case it has gone into innocent hands, the evidence as to whether the sale was fair and whether the land sold for what it was then worth, is very material. Indeed, the whole case turns upon it. If the administrator has already accounted for its real value, there is no cause of complaint. The real, true value at the time, is therefore material, and ought not to have been rejected.

We think the rights of all the parties will be better settled upon another trial, and as this evidence ought to have been admitted, we think the verdict ought to be set aside.

Judgment reversed.

ELI J. HULSEY *et al.* plaintiffs in error, *vs.* WARREN J. CLARK, defendant in error.

1. Where the description in a deed is so ambiguous as to leave it doubtful whether a certain piece of land was intended to be included in what was conveyed, parol evidence is admissible to identify the premises.
2. As the record does not show the charge of the Court on the question of the statute of limitations, and as that depends on the fact whether the prior possessions to which defendant must tack his, were adverse or not, and whether his or those to which he must so tack were in succession, all of which was a matter for the jury under the charge of the Court, we do not feel authorized to interfere with the verdict on the ground that it was contrary to law or against the evidence.

Ejectment. New trial. Evidence. Ambiguity. Before Judge HOPKINS. DeKalb Superior Court. September Term, 1872.

Warren J. Clark brought complaint against Eli J. Hulsey and William G. Mitchell for part of lot number twenty-eight,



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in the sixteenth district of DeKalb county, it being on the northeast corner of said lot, and on the northeast side of South river, containing three and a half acres, more or less. The defendants pleaded the general issue and the statute of limitations.

The evidence made the following case: The plaintiff claimed under a deed conveying "all that part of lot number twenty-eight, lying on the northwest side of said branch." The branch had been identified in a preceding part of the deed as running through the corner of lot number twenty-seven. It ran in a northeast direction, but did not run quite through lot number twenty-eight. It emptied into a river running through the northeast corner of the lot, crossing the north and south boundary line of the lot on the east side a short distance from where the branch joins the river. The land in dispute was that part of the lot in the northeast corner cut off by the river, and the question was, did the deed convey that portion? Plaintiff claims under a deed made in 1847, by one Collier, under a power of attorney from one Lofton. The land was afterwards conveyed to Minter, and by Minter, in 1862, to plaintiff. Each deed described the land alike, the power of attorney to Collier describing it as on the north and west sides of the branch.

It was in proof that neither of plaintiff's predecessors in the title, and who were given in the abstract of title attached to the declaration, was ever in possession of the premises in dispute, and that plaintiff never claimed them until 1869, and instituted his action in 1870.

On the trial defendant offered to prove by one George W. Morris that at the time Minter sold to plaintiff "it was agreed and understood by them that a certain fence row or hedge row, which was pointed out at the time, was the northeast boundary of that part of lot number twenty-eight sold by Minter to Clark, the plaintiff, and that he did not own or sell any land northeast of said line."

The Court, on plaintiff's motion, rejected the evidence.

The "fence row, or hedge row," proposed to be proved, ran

nearly northwest from the mouth of the branch, on the west side of the river, cutting off not only the premises in dispute, but a small portion of the lot on the upper line, lying west of the river.

The jury found for the plaintiff. The defendants moved for a new trial on account of error in the aforesaid rejection of testimony, and because the verdict was contrary to the law and the evidence. The motion was overruled, and the defendants excepted.

The record fails to disclose the charge of the Court.

WILLIAM EZZARD; HULSEY & TIGNER, for plaintiffs in error.

L. J. WINN; HILLYER & BROTHER, for defendant.

TRIPPE, Judge.

1. Upon looking at the plat of lot number twenty-eight, which was in evidence, and which was in accordance with the description given of the premises in the report of the facts of this case, it was evident that the question might be very easily raised whether or not the land sued for was included within the boundaries set forth in the deed, to-wit: that part of lot twenty-eight, lying northwest of a certain branch. The branch did not run through the lot, but emptied into a river, which cut off a few acres of the northeast corner of the lot, the river passing out of the lot across the eastern boundary not very far from said corner. A glance at such a plat, at once discloses the difficulty of determining whether those few acres did or did not pass by the deed. The Court below seemed to think they did pass, and excluded the testimony which was offered to prove that the parties did not intend to include them in the deed. The Chief Justice, concurring in the judgment admitting the evidence, puts his opinion on another ground, and does not think that the part sued for can be included within the description given by the deed. Moreover, it was in evidence that neither the plaintiff or his predecessors in the title ever had possession of that part of the lot, nor ever

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claimed it from 1847 to 1869, yet a verdict was rendered in his favor. There is, evidently, an ambiguity; at least, the conflicting views that have been taken of this deed strongly suggest one. The plaintiff below claimed that, because the branch runs so nearly through the lot, the little corner cut off in the northeast was certainly not intended to be left attached to the balance of the lot, which it joins by so narrow a boundary that a fair construction of the terms "northwest side," in one instrument, and "north and west side," in another, entitle him to the premises, and should exclude all parol testimony to the contrary.

The defendant insists that such a long non-claim of title and long continued acquiescence in the possession by others, and that the words of the deed, strictly construed, do not include the premises, at least that all these together make a case where all evidence as to what the parties understood the boundaries to be, when the deed was executed, or the contract of sale was made, should be admitted. The Code, now, in section 3748, admits parol evidence to explain all ambiguities, both latent and patent. Parol evidence is, of necessity, admissible to apply a writing to its subject, and is competent to show what parcel of land fits all the parts of the description in a deed: 20 *Georgia*, 689. If, in making that application, any ambiguity arises as to what does fit the description used by the parties, why may not the express understanding of the parties be used as a solution of the question?

2. The record does not show what was the charge of the Court on the question of the statutes of limitation. The defendant must either show that he has had the possession the statutory term, or that, added to his, the possession of others *under whom he claims*, will make that term. The prior possessions should be in succession. All this was a question for the jury under the charge of the Court.

Judgment reversed.

WARNER, Chief Justice, concurring.

I concur in the judgment of the Court in this case, but hold that the plaintiff's deed did not include or cover the land in dispute. The words of the plaintiff's deed are "to all that part of lot number twenty-eight in said district, lying on the northwest side of said branch, containing two hundred and fifty acres, be the same more or less." The land in dispute is northeast of the branch, across the river. There is no ambiguity on the face of the plaintiff's deed, and therefore parol evidence was not admissible to explain it. If the bed or run of the branch had been changed or altered since the execution of the deed, parol evidence would have been admissible to show that fact, but not otherwise. The plaintiff's deed calls for the land "laying on the northwest side of the branch," as it then run, at the time of his purchase of it, and he must recover on the strength of his own title, although the defendants have none, except the naked possession. As the Court admitted parol evidence in relation to the title of the land in dispute, the evidence of Morris should also have been admitted.

MITCHELL COGSWELL, plaintiff in error, vs. THE STATE OF
GEORGIA, defendant in error.

1. It is not error in the Judge of the Superior Court to refuse to continue a criminal case on the ground of the absence of a witness, it not appearing that the witness has been subpoenaed, and no reason is given why he was not.
2. Where on a motion for new trial one of the grounds insisted on was, that one of the jury who tried the cause was asleep during a portion of the trial, and no affidavits were filed with the motion, but it was proposed to show by parol, at the hearing, that such was the fact, and the Court refused to hear the witnesses, and refused also the new trial:
Held, That the proof ought to be made as a part of the motion in writing, by affidavits attached, and that a new trial ought not, in any event, to be granted on such a ground unless it affirmatively appeared that the prisoner and his counsel did not know the juryman was asleep before the jury retired to find a verdict.

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3. When a prisoner was regularly arraigned and pleaded not guilty, and was tried and found guilty and a new trial granted, it is not necessary that he should be again arraigned on the new trial.

Criminal law. Continuance. New trial. Jury. Arraignment. Practice in the Superior Court. Before Judge SCHLEY. Chatham Superior Court. May Adjourned Term, 1872.

Mitchell Cogswell was placed upon trial for the offense of murder, alleged to have been committed upon the person of one Derry Womack, on January 9th, 1872.

The jury returned a verdict of "guilty," whereupon the defendant moved for a new trial upon the following grounds:

1st. Because the Court erred in refusing to continue the case on account of the absence of Joe Hunter, a material witness for the defendant.

2d. Because one of the jurors, to-wit: Patrick Whelan, was at times, asleep during the trial, during the delivery of a part of the testimony, during the argument of counsel and during the charge of the Court.

3d. Because the defendant was not arraigned.

To the above grounds of new trial the Court attached notes, substantially, as follows:

To the first: In the showing for continuance it appeared that the witness had not been served with a subpoena, and no reason was assigned for such failure.

To the second: There was no evidence submitted to the Court upon the hearing of the motion for a new trial, to establish the truth of the fact alleged in this ground. Affidavits should have been submitted, and in their absence the Court refused to hear parol proof.

To the third: The defendant had been previously tried and convicted, and a new trial was awarded to him. Upon the first trial he had waived arraignment and pleaded not guilty. Upon the second trial arraignment was unnecessary.

The motion was overruled, and the defendant excepted upon each of the aforesaid grounds.

A. P. ADAMS, by HENRY B. TOMPKINS, for plaintiff in error.

ALBERT R. LAMAR, Solicitor General, by A. B. SMITH, for the State.

McCAY, Judge.

1. It would be a very dangerous precedent if we were to interfere with the judgment of the Circuit Judge in refusing this continuance. It does not appear that the witness was subpoenaed. Nor is it set forth what he would testify. The statement in the application that the witness is material is insufficient. The facts he would testify to ought to appear, that the Court may judge of the materiality. Nor does it appear why he was not subpoenaed, or whose fault it was. That a subpoena has been issued is not enough. Who undertook to serve it? We do not know. It may have been the sheriff, or a friend of defendant, or defendant himself. We think there is no ground for a new trial in this refusal. It appears, too, from the record of the first trial, that the witness knew nothing of the case except simply that deceased was a violent man. This might have been material. But from the evidence on this trial, we do not see that it was of any importance in fact. There seems to have been nothing developed that would render proof of this kind of importance.

2. Properly and regularly, the decision of the Judge on a motion for a new trial ought to be on the papers. Any question of fact should appear in the motion, and if affidavits are needed to support the statements, they should form part of or be attached to the motion.

The party called on to show cause has a right to be informed of the movant's case, so that he may be prepared to show cause. To allow either party to appear before the Judge and swear and examine witnesses by parol, might lead to delays, and would greatly embarrass the Courts. We think, therefore, the rule announced by the Judge, that the facts claimed to be true in this ground for a new trial, should have been

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verified by affidavits, and attached to the motion, either originally or by amendment. We do not, however, mean by this to say that the affidavit of the juror is the best evidence, or that it is admissible at all, except to support the verdict or to explain or deny charges affecting its integrity. But there is a stronger reason for refusing the motion on this ground than the want of proper form in the proceeding. It was not even proposed to show that the defendant and his counsel were not fully aware of the conduct of his jurymen before the verdict of guilty was rendered. This must appear affirmatively: 36 *Georgia*, 322; 39 *Ibid.*, 660; 28 *Ibid.*, 439; 26 *Ibid.*, 431. Parties are not permitted thus to play hot and cold. This would have been a very good verdict had it been the other way. Parties cannot know of an impropriety in the jury, submit to it, taking the chances of a verdict, and then set up facts which came to their knowledge before the verdict.

3. Whether there should be a new arraignment or not, seems to be settled by the nature of things. The object and the form of it, is to read the indictment to the prisoner, and to give him a formal opportunity to plead. That has been done. He has heard the indictment read, he has pleaded to it, and it seems a folly to go again over the same form. His plea of not guilty is on the minutes. It is absurd again to ask him and get the same reply. The evidence makes a strong case of guilt. No legal error has been committed, and we affirm the judgment refusing a new trial.

Judgment affirmed.

THE SELMA, ROME AND DALTON RAILROAD COMPANY,
plaintiff in error, *vs.* ANN E. LACEY, defendant in error.

WARNER, Chief Justice. 1. Where the widow brings suit in this State for damages resulting from the killing of her husband in the State of Alabama, through the negligence of a railroad company, the Court will be governed by the laws of this State as to the mode of procedure in ascertaining the rights of the parties, but as to what are their rights,

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must be determined by the laws of Alabama, where the act complained of was done.

2. The section of the Code of this State which declares that pleadings may be amended, whether in matter of form or of substance, provided there is enough in the pleadings to amend by, properly construed, means, that in order to admit of an amendment, a valid cause of action must be set forth in the original declaration.
3. In a suit by a widow in this State, against a railroad company for the killing of her husband in the State of Alabama, the declaration cannot be amended after the lapse of one year from the alleged killing, for the reason that the statute law of Alabama limits the right to recover damages therefor to one year from the time of the death, and gives the right of action to the personal representative of the deceased.

MCCAY AND TRIPPE, Judges. Where, by the law of Alabama, the personal representative of a party who is killed by the wrongful act or negligence of another, is entitled to an action for damages therefor, no other person but such personal representative can bring such action in the Courts of this State, when the killing occurred within the State of Alabama. The widow of the party killed cannot, in her own name as such widow, maintain such action.

State. Constitutional law. Comity. Railroads. Amendment. Before Judge HARVEY. Whitfield Superior Court. October Term, 1872.

For the facts of this case, see the decision.

J. E. SHUMATE; PRINTUP & FOCHE, for plaintiff in error.

J. & J. A. GLENN; D. A. WALKER, for defendant.

WARNER, Chief Justice.

On the first of October, 1870, the plaintiff instituted her action against Barney, superintendent, and Breed, lessee, of the Selma, Rome and Dalton Railroad Company, in the county of Whitfield, in this State, to recover damages for the killing of her husband by the running of an engine and train of cars by said railroad company on the 3d day of August, 1870, near Oxford, in the State of Alabama. The case was tried in the Court below, and brought before this Court by a

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writ of error at the July term, 1871, when the judgment of the Court below was reversed, this Court holding and deciding, that the action could not be maintained in the Courts of this State for the injury done within the territory of the State of Alabama, without an allegation in the declaration that the law of the State of Alabama gave to the plaintiff a right of action to recover there damages for killing her husband by the railroad company: See 43 *Georgia Reports*, 461. When the case was remitted back to the Court below, the plaintiff offered to amend her original declaration by adding a count thereto that her husband was killed by the said railroad company by the negligent running of its engine and cars on its said road, and setting forth the law of the State of Alabama, which authorized her to recover damages from the company for the killing of her husband in that State. The amendment was filed on the 23d day of October, 1871. On the last trial of the case, the defendant filed a special demurrer to the plaintiff's amendment. First, because she does not show thereby any legal cause of action according to the law of the State of Alabama. Second, because there was no original cause of action pending in the Court below, under the decision of this Court, to be amended, that the alleged original cause of action was out of Court, and there was nothing in Court to amend by. The Court overruled the demurrer, and the defendant excepted. The Court then proceeded with the trial of the case, and the jury found a verdict in favor of the plaintiff for the sum of \$666 00. A motion was made for a new trial on the several grounds of error alleged therein to the ruling of the Court, which was overruled, and the defendant excepted. By the 2297th section of the Revised Code of Alabama it is declared: "When the death of a person is caused by the wrongful act, or omission, of another, the personal representative of the former may maintain an action against the latter at any time within one year thereafter, if the former could have maintained an action against the latter for the same act, or omission, had it failed to produce death." The 2298th section declares that "the damages re-

ceived in such action cannot exceed three years' income of the deceased, and in no case exceed \$3,000 00. The amount recovered is for the benefit of the widow ; if there be none, then for the benefit of the child or children ; if there be none, then to be distributed as other personal property amongst the next of kin of the deceased." The 2300th section declares that, "If such death is caused by the wrongful act, omission, or culpable negligence of any officer or agent of any chartered company, or private association of persons, such company or association are responsible in damages, and an action may be maintained against them, *as provided in the preceding sections.*" Such is the law of Alabama regulating the plaintiff's right to recover damages against the defendant for killing her husband in that State. The right of action is confined to *the personal representative* of the deceased, and although the amount recovered by the personal representative of the deceased is for the benefit of the widow, still she cannot maintain an action for it in her own name. The right of the personal representative of the deceased to recover damages for his death is limited to one year *thereafter*.

In conducting the trial of the case, our Courts will be governed by our own laws as to the mode of procedure in ascertaining the rights of the parties, but as to what are their rights must be determined by the laws of Alabama, where the act complained of was done. The 2920th section of our Code did not give to the plaintiff any right of action against the defendant for killing her husband in the State of Alabama, because it had no extra-territorial operation. The alleged fact in the original declaration, that the defendant killed the plaintiff's husband in the State of Alabama, was no cause of action for which a suit could be maintained under the statute law of this State, and so this Court decided when it sustained the demurrer to the plaintiff's original declaration. A cause of action *defectively* set forth may be amended, but when there is *no cause of action* set forth there is nothing to amend by, and that is what the 3429th section of our Code means when it declares, that pleadings may be amended whether in matter of

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form or of substance, provided there is enough in the pleadings to amend by. No amendment adding a new and distinct cause of action shall be allowed, unless expressly provided by law: Code, 3430. The plaintiff had not set forth any cause of action against the defendant in her original declaration, which the Courts of this State could recognize and enforce, under the provisions of our own statute, and consequently there was nothing to amend by. The plaintiff, by her amendment, introduced a new cause of action, given to her by the statute law of Alabama, and asked the Court, in the spirit of comity, to enforce that new cause of action in this State. If the amendment could have been properly allowed, still, there was a fatal defect apparent on the face of the declaration as amended. The husband of the plaintiff is alleged to have been killed on the 3d day of August, 1870. The amendment was not filed until the 23d day of October, 1871—more than one year after the alleged death of her husband; besides, she sued in her own name, and not as the personal representative of her deceased husband. The statute law of Alabama, by which she now seeks to recover damages for the killing of her husband in that State, limits her right to recover damages therefor to one year from the time of his death, and gives the right of action to his personal representative. It is true, that the laws of other States and foreign nations have no force and effect of themselves within this State, further than is provided by the Constitution of the United States, and is recognized by the comity of States, but the Courts of this State will enforce this comity until restrained by the General Assembly, so long as its enforcement is not contrary to the policy or prejudicial to the interests of this State: Code, section 9.

When the Courts of this State voluntarily undertake to enforce the laws of another State in a spirit of comity, they are bound to be governed by them so far as *the rights* of the parties are concerned, who are affected by them—that is to say, the rights of the parties in this case must be measured and controlled by the statute of Alabama, when the Courts of this State voluntarily undertake to enforce it here; and if the

plaintiff's right to sue for damages must be commenced within one year from the death of her husband, as a condition to her right to recover in that State, so the Courts of this State must administer that law here. Inasmuch, therefore, as the plaintiff could not have maintained her action in her own name for the injury complained of, or have maintained her action for damages in the Courts of Alabama for that injury at the time the amendment was filed (it being more than one year from the death of her husband) neither can she maintain her action therefor in the Courts of this State, and the Court below erred in overruling the demurrer to the plaintiff's amended declaration.

The fatal error of the plaintiff, in the Court below, consists in the assumption that her original action to recover damages for the injury complained of was authorized by the common law, or by the law of nations, which is a part of the common law, whereas, her right to recover the damages sued for was founded on the statute of this State, and that statute being a domestic municipal regulation only, had no extra-territorial operation, and did not afford the plaintiff any cause of action against the defendant for the injury complained of in the State of Alabama. Whilst it is true, that the Courts of this State will, in a spirit of comity, enforce the statute of Alabama in favor of the plaintiff, so as to enable her to recover damages for the injury done to her there, (the statute of that State not being contrary to the policy or prejudicial to the interests of this State) still, when she does so, she asserts a distinct cause of action arising *exclusively* under the statute of that State, and her rights must necessarily be controlled by it. In other words, the Courts of this State will administer the law of Alabama just as the Courts of Alabama would administer it, so far as *the rights* of the parties are concerned. If the plaintiff could not have recovered in the Courts of Alabama for the injury done there at the time the amendment was filed, or in her own name for that injury, then she cannot recover therefor in the Courts of this State. In administering the law of Alabama for the benefit of the plaintiff, the Courts of this State

Franklin *vs.* Smith.

must be governed by that law, so far as her rights claimed under it are concerned. In our judgment, the Court below erred in not sustaining the demurrer to the plaintiff's declaration as amended, and in not dismissing the same.

Let the judgment of the Court below be reversed.

MCCAY and TRIPPE, Judges, concurring.

Where, by the law of Alabama, the personal representative of a party, who is killed by the wrongful act or negligence of another, is entitled to an action for damages therefor, no other person but such personal representative can bring such action in the Courts of this State, when the killing occurred within the State of Alabama. The widow of the party killed cannot, in her own name as such widow, maintain such action.

WILLIAM D. FRANKLIN, plaintiff in error, *vs.* THOMAS V. SMITH, deputy sheriff, defendant in error.

1. When a sheriff, shortly after the passage of the Act of 1868, known as the Relief Law, received the affidavit of a defendant according to the provisions of said Act, and received the papers as directed by the Act, and in 1872 the proceedings by the defendant, under said Relief Act, were dismissed on motion of the plaintiff:

Held, That it was not error in the Judge of the Superior Court to refuse to hold the sheriff in contempt and liable for punishment for his obedience to said law.

2. Even if the Act of 1868, known as the Relief Law, be unconstitutional, it is no *contempt* of the ordinary process of execution to obey it, if in good faith the sheriff so did.

Sheriff. Contempt. Attachment. Before Judge HARVEY. Floyd Superior Court. July Term, 1872.

William D. Franklin petitioned the Superior Court of Floyd county for a rule *nisi* against Thomas V. Smith, calling upon him to show cause why he should not be required to pay over the money due upon an execution in favor of peti-

tioner against Thomas S. Burney, placed in his hands for collection.

The respondent answered the rule, setting up, substantially, the following facts :

The execution in favor of Franklin vs. Burney for \$300 00 principal, and \$29 25 interest, issued from a judgment rendered on January 30th, 1862, was placed in respondent's hands in November, 1868, and on the 2d of December of the same year, was levied upon one Victor cane mill, two hundred bushels of corn, one mare and colt, and one mule. Burney filed his affidavit claiming the benefit of the Relief Act of 1868, and gave bond with a solvent security, according to the terms of said Act. The papers were returned to the Superior Court and the property to the defendant. Respondent was then deputy sheriff under Levi P. May, sheriff, whose term of office expired about the year 1870, when respondent also ceased to discharge official duties. Respondent merely complied with the terms of an imperative statute of the State, and in doing so, in good faith, supposed that he was discharging his duty.

It appeared from the records and minutes of the Court that the affidavit of Burney, under the Relief Act of 1868, was dismissed at the January adjourned term, 1872. It was admitted that the execution was then placed in the hands of Joseph H. Lumpkin, the present sheriff, who advertised the property levied on for sale on the first Tuesday in July, 1872; that a claim was filed by Burney to all the property levied on except the corn, under the Homestead Act of 1868; that the corn was neither delivered on the day of sale nor claimed.

After argument, the Court discharged the rule, and petitioner excepted.

D. R. MITCHELL, by UNDERWOOD & ROWELL, for plaintiff in error.

ALEXANDER & WRIGHT, for defendant.

McCAY, Judge.

1. For myself, I am not prepared to say that the facts of this case show *any* liability on the part of the sheriff. He has simply obeyed the law. I am aware that it is said this law is not constitutional, but this Court has, on several occasions, held the contrary: See 38 *Georgia*, 350; 40 *Ibid.*, 49. The Act does not require the affidavit to set forth the specific grounds of the equity. It is the duty of the defendant to do this at the first term, and if he fail, the affidavit will be dismissed. Here the plaintiff has permitted the case to *stand*, undisposed of; the first and several other terms, to pass without any statement in detail, by the defendant, of his equities. This was no fault of the sheriff, but is the fault of the plaintiff—a fault, too, which, even if the sheriff would have been liable at the first term, has greatly increased the sheriff's risk.

2. But even if the Act were unconstitutional, we are not prepared to say that the sheriff is guilty of contempt, for failing, under an ordinary process, to disobey it. Whether an action will lie, is not the question. Is he in *contempt* of the process of the Court? Ought he to be punished for obeying an Act of the Legislature, at the time recognized by the Courts as valid? We think not. The sheriff is not a judicial officer. It would be a very harsh rule to say that he must, on pain of contempt, decide for himself whether a law is constitutional or not. When a party seeks to hold a sheriff liable, if he chooses to do so by means of a rule, he takes upon himself to show that the officer is *in* contempt of the process of the Court, and he submits that question to the sound discretion of the Court. He has a right to his rule absolute only at the sound discretion of the Court, and if the sheriff has not been guilty of contempt, the rule absolute ought not to be passed. It seems to us that it is a shock to all sense of propriety to say that the sheriff is in contempt for failing to disobey an Act of the Legislature. And so the Act of February 25th, 1869, expressly enacts. We are aware that cases may be found where a rule has been made absolute under such circum-

stances; but it will be found, on looking closely into them, that this point was not made and insisted on. At any rate, we have now an express law on the subject in terms relieving the sheriff from the contempt, if there be any, in all such cases.

Judgment affirmed.

JESSE A. HOLTZCLAW, plaintiff in error, vs. JAMES D. RUSS,
Ordinary, defendant in error.

ANDREW S. GILES, plaintiff in error, vs. JAMES D. RUSS,
Ordinary, defendant in error.

1. The Supreme Court of this State having decided in *Gormley vs. Taylor*, 44 Georgia, 76, that the District Judges were legally appointed and in office, and said Judges having continued to act for nearly one-half of their actual period of service after said decision was made, and the General Assembly, by an Act passed December 7th, 1871, by a majority of two-thirds of each branch thereof, repealed the Act organizing said Court, having recognized the legal existence and authority of said Court and Judges thereof, in enacting that "It shall be the duty of the clerk of the District Court to transmit all cases now pending on the civil or criminal docket of said Court to the Superior Court, which said Court is hereby vested with jurisdiction over the same," constitute sufficient authority to determine the question as to the right of said officers to compensation, and that they are entitled to compensation for services rendered as such.
 2. Under the provisions of the Constitution requiring an "equitable apportionment of the compensation of the District Judges and attorneys between the counties comprising their districts," the tax required by the Act organizing said Court to "be levied in the several counties composing each Senatorial District * * * upon the taxable property returned therein, as together, will raise an amount sufficient to pay the salaries," etc., should be apportioned between said counties in proportion to the amount of taxable property returned in said counties, respectively.
 3. Interest on an unpaid salary of such officer cannot be enforced against the county out of which the same is to be collected.
- WARNER, Chief Justice, dissented.

Mandamus. District Court. Officers. Tax. Interest.
Before Judge JOHNSON. Taylor Superior Court. October
Term, 1872.

These two cases, involving the same questions, were argued and decided together.

Jesse A. Holtzclaw petitioned the Judge of the Superior Courts of the Chattahoochee Circuit for a *mandamus nisi* against James D. Russ, Ordinary, requiring him to show cause why he should not be compelled to levy the tax as directed by law, to pay the petitioner the proportion of his salary as Judge of the District Court for the twenty-third Senatorial District, due by the county of Taylor, for the time he served prior to the abolishment of said Court by an Act of the General Assembly.

The respondent answered said petition, substantially, as follows: That petitioner was not appointed to fill an unexpired term as Judge of the District Court of the twenty-third Senatorial District, and although appointed by R. B. Bullock, acting Governor of said State, to fill said office of District Judge, said appointment was not confirmed by the Senate, as the Constitution of the State requires.

That petitioner never fully entered upon his duties as Judge in this particular, to-wit: No jury was ever impaneled or sworn according to law by said Judge, although it was his duty, as soon after his appointment as practicable, to have drawn and organized a jury.

That the county treasurer of said county of Taylor has never called on respondent to levy a tax to pay petitioner's salary, nor has there ever been any satisfactory evidence of the indebtedness of the county to said petitioner presented to respondent.

The petitioner demurred to the answer. The demurrer was sustained, and respondent excepted.

The Court then passed an order requiring respondent to levy such tax upon the taxable property of the county of Taylor as will raise an amount sufficient to pay petitioner for salary as District Judge of the twenty-third Senatorial District from January 1st to December 7th, 1871, to-wit: the principal sum of \$373 75, together with interest, this amount

being reached by dividing the entire salary between the counties composing the district, according to population.

To which order respondent excepted. Respondent assigns error upon each of the aforesaid grounds of exception.

The proceedings in the case of Andrew S. Giles were identical with the preceding, with the only exception that his claim was for salary as District Attorney.

W. S. WALLACE; HOLSEY & COLLIER, for plaintiff in error.

THRASHER & THRASHER, for defendant.

TRIPPE, Judge.

1. The leading question made in these cases, both in the response to the *mandamus nisi* and in the argument here is, that the District Judge and attorney were not appointed by the Governor with the advice and consent of the Senate, and, therefore, not being appointed according to law, are not entitled to the compensation they ask. The ground upon which the decision of that question is put in this case, makes it unnecessary to enter into all the argument and learning involved in the discussion in *Gormley vs. Taylor*, 44 *Georgia*, 76. In that case, decided at the July term, 1871, it was held by a majority of this Court that the appointment of these officers was legal; and thus sanctioned, they continued in office for several months, with all the responsibilities devolved upon them by law resting on them. The Legislature, on the 7th of December, 1871, passed an Act repealing the Act organizing the District Court, and in the second section of said Act enacted: "That it shall be the duty of the clerk of the District Court to transmit all cases now pending on the civil or criminal docket of said Court to the Superior Court, which said Court is hereby vested with jurisdiction over the same." This Act was a legislative recognition of the legal existence of the District Court and its officers, and that *civil and criminal cases were legally on their dockets*; else it could not have

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directed that such unfinished business should be transmitted to another tribunal, and vested that tribunal with jurisdiction over it, and with power to finish it. On the 13th of the same month, another Act was passed "to compensate the clerk and sheriff of the Superior Court, and other officers of Richmond county, for services rendered in the District Court," etc., and therein directed that they should be paid "out of the tax levied in said county for the expenses of said Court." The District Judge and attorney having thus filled a large portion of their actual term of office after this decision of the highest judicial tribunal of the State, and the Legislature having thus recognized the validity of the organization of the District Court, and necessarily, the legal existence of its officers, forces the conclusion that they are entitled to the compensation provided by law, without inquiring into the mode of their appointment, or deciding the question whether or not it was strictly according to law.

2. The Constitution of the State, Article V., section 10, paragraph 2, provides that there shall be an "equitable apportionment of the compensation of the District Judges and attorneys between the counties composing their districts." The Act of 1870, organizing the Court, says: "There shall be levied in the several counties composing each Senatorial District, such tax upon the taxable property returned therein, as together, will raise an amount sufficient to pay the salaries of the District Judges and attorneys," etc. The proper construction of these provisions, in determining what is an "equitable apportionment," is, that the tax to be levied in each county shall be in the proportion its taxable property bears to the aggregate taxable property of the district. Any other rule would work a discrimination in the percentage of tax to be levied in the several counties. If levied in the ratio of population, then one county, having three-fourths of the population of another county, though more taxable property, would pay only three-fourths of the tax paid by that other. In many instances the disproportion in the percentage of tax levied would doubtless be greater than in the instance given.

3. We do not think the compensation provided in the statute bears interest, if not paid, from the different periods of payment prescribed in the statute. We know of no instance where a salary has been held to draw interest. The District Judge is a public officer, recognized by the Constitution. His salary is payable quarterly, as other officers of the State, and though the law directs that the money collected for his payment shall be paid into the county treasury, and by the county treasurer paid to him, we do not think it changes the question as to interest, so as to make it different from what it would be if it were required to be paid into the State treasury, and to be paid out by the State Treasurer.

It was not incumbent on these officers to show that they had taken the oaths prescribed by statute or that the bond required of one of them had been given. If they have the proper commissions, the compliance with these provisions is presumed. If it were a fact that the oaths had never been taken or that the bond had never been given, the question would be different. But an omission to recite these facts in the application, was not demurrable, nor could the issue be made without a denial on the part of the respondent, that all this or any one had been done. As to the necessity of these applicants showing that their claims have been ascertained by suit or judgment, or that they had demanded payment of their salaries, the statute prescribes what the salary shall be and how it shall be levied and paid.

Judgment affirmed with instructions.

MCCAY, Judge, concurred, but furnished no opinion.

WARNER, Chief Justice, dissenting.

I dissent from the judgment of the Court in this case for the reasons expressed in my dissenting opinion in *Gormley vs. Taylor*, 44 *Georgia Reports*, 102.

THOMAS JOHNSON, plaintiff in error, vs. ROBERT A. McCOMB, executor, defendant in error.

1. When, on the trial of a claim case, it appears that the defendant, *after the date of the judgment*, had conveyed the land to the claimant, and Jackson was introduced to prove that some years previous to the date of the judgment he had bought the land from defendant and paid the consideration money, but had taken no deed or other writing, and that the deed made to the claimant by defendant was made at his (the witness') request; that he had sold the land to the claimant and received the consideration, and the defendant had, at his request, made the deed to the claimant, in pursuance of the purchase and payment several years before the judgment:
Held, That Jackson was a competent witness, under the Evidence Act of 1866, notwithstanding the death of defendant, the maker of the deed.
2. The testimony was not illegal under the rule that express trusts must be in writing.
3. When the Judge of the Superior Court has granted a new trial, on the ground that the verdict is contrary to the evidence, this Court will not interfere to reverse his judgment, even though there be some evidence to sustain the verdict, it not appearing that the Judge has abused the discretion granted him by law in such cases.

New trial. Witness. Trust. Evidence. Before Judge ROBINSON. Baldwin Superior Court. August Adjourned Term, 1871.

Thomas Johnson had an execution in his favor, based on a judgment obtained on May 21st, 1866, against Walter H. Mitchell, Nathan Hawkins and Theodore Goodwyn, levied on a house and lot in the city of Milledgeville, as the property of said Mitchell. A claim was interposed by Robert A. McComb, as executor of Samuel McComb, deceased. Upon the trial of this issue the following evidence was introduced for the plaintiff in execution:

- 1st. The execution with the entry of the levy thereon.
- 2d. A deed made by Walter H. Mitchell, one of the defendants in execution, dated August 31st, 1866, conveying the property levied on to Samuel McComb.

3d. Obadiah Arnold, the sheriff, testified that at the time of the levy (the date of which does not appear) L. H. Briscoe was in possession of the property.

4th. John Hammond testified that Mitchell lived on the place levied on from the year 1851 to the time he left Baldwin county, in November, 1865; that James Jackson's family also lived on said place during the years 1863, 1864, and until November, 1865, when they, together with Mitchell, moved to Macon.

Plaintiff closed.

1st. James Jackson, sworn for claimant, testified that in November 1862, Mitchell, who is now dead, verbally sold to him the property levied on; that witness gave to Mitchell five negroes, among them a valuable blacksmith, then on Mitchell's plantation in Putnam county, for the house and lot and three negroes; that at the time of the trade Mitchell and witness were both living on the former's plantation in Putnam county; that Mitchell retained the negroes transferred verbally to him by witness, worked them on his plantation and paid no hire for them. That witness went into possession of the property with his family in January, 1863; moved his furniture into it, insured it, and used it as his own until it was sold to McComb; that witness sold the property to McComb, received the purchase money and directed Mitchell to make the deed to McComb; that witness thinks Mitchell would have made a deed to him at any time, on request; that Mitchell's family lived with witness until they all moved to Macon, in November, 1865; that witness married Mitchell's daughter; that he knew nothing about the indebtedness upon which the execution was based, but from the amount of interest thereon it must have been contracted before the war, and it consequently must have existed at the date of the aforesaid verbal trade; that, at the time of the trade, witness supposed Mitchell was rich—worth three times as much as he was; that no deed was made because witness was afraid of confiscation by the United States Government, as he was a member of Congress at the time of secession and withdrew therefrom, and accepted

the office of Judge Advocate in the Army of the Confederate States.

2d. P. M. Compton testified that Jackson insured the house with him for the years 1863, 1864, 1865 and 1866, and paid to him the premiums thereon; that he did not know whose money it was that he received, but Jackson paid it.

The jury found the property subject. Claimant moved for a new trial because the verdict was contrary to the law and the evidence. The motion was sustained and a new trial ordered. Whereupon, the plaintiff in exception excepted and now assigns error upon the following grounds, to-wit:

1st. Because the verdict was not contrary to any legal evidence, as the Court erred in allowing the witness, Jackson, to testify over the objection of the plaintiff, as Mitchell, the other party to the contract, was dead.

2d. Because the verdict was not contrary to any legal evidence, as, even if Jackson were a competent witness, the Court erred in admitting his testimony over the objection of plaintiff, for the reason that it was an effort to set up an express trust by parol.

3d. Because the verdict was neither contrary to the evidence nor to the law.

WILLIAM MCKINLEY, for plaintiff in error.

L. H. BRISCOE; SANDFORD & FURMAN; JACKSON & CLARKE, for defendant.

MCCAY, Judge.

1. We think Jackson was a competent witness. It is only by the most violent use of language that he can be said to be a party to the cause of action on trial. The issue is between the plaintiff in *fi. fa.* and the claimant, and the thing to be tried is, whether the property levied on is subject to the lien of the judgment. Jackson is certainly no party to *this* issue; nor is he a party to the record. The matter on which he is called to testify arises collaterally. He is, in effect, called on to show

that Mitchell's deed was made in pursuance of a contract made several years before, and fully executed on Jackson's side. The estate of Mitchell has no interest, nor is it a party. True, the execution is against Mitchell, but as was not necessary, his representative is not made a party to the present proceeding. Besides, under the facts, as stated, Mitchell's estate is not interested in any way in the event of the suit. If the land is subjected, the warranty to McComb is broken, but the land will be sold to pay Mitchell's debt, so that its interest is balanced. Moreover, Jackson would be a good witness before the Evidence Act. He has no interest, apparently, in the event of the suit. True, he sold the land and got the consideration, but it appears that McComb, with a full knowledge of the facts, took and relied upon Mitchell's warranty, and we do not see how he has any right, even if he loses the land, to repudiate this written warranty and fall back on Jackson, against whom he has no warranty at all. The only ground he could rely on would be fraud of Jackson, and that is repudiated by the evidence of Jackson, and, for the purpose of determining his competency, as the case stands, that is to be taken for true. In any view of it, therefore, we think Jackson competent as a witness. So, too, we think his evidence is not illegal. He is called to show that the deed made by Mitchell was made in pursuance of a parol contract made with him (Jackson) several years before. This is a very common occurrence. Deeds are daily made in this way. Bonds for titles are taken—perhaps transferred—the money is finally paid, the deed made and the bond destroyed. To exclude such testimony is to deny the right to show what consideration moved the grantor to make the deed. This is always admissible, even to contradict the deed: 20 *Georgia*, 723; 24 *Ibid.*, 333; Code, 2690.

2. Nor is this the setting up, by parol, of an express trust. Here was no express trust. There is no pretence that Mitchell agreed to hold as trustee for Jackson. It is the ordinary case of proving the facts by parol, from which the law implies a trust. Jackson proves that he bought this land from Mitchell

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and paid him for it. Nothing was said about the deed—at least, the proof shows nothing. From these facts, the law implies a trust: See Revised Code, sec. 2290, 2291. Again, this trust, so far as Mitchell is concerned, was executed by the deed to McComb, since he made the deed in accordance with his implied obligation, getting nothing from McComb.

3. The evidence against the verdict is very strong. If Jackson's testimony is true, the land is not subject. Had the plaintiff's debt been contracted after this asserted sale, a different question would arise. But if what Jackson says is so, the secrecy, etc., of this sale did not in any way hurt the plaintiff. He gave no credit to Mitchell, misled by his ignorance of this sale. Upon the facts of the sale, there is no other witness but Jackson. True, the circumstances related fail to show that this trade of the negroes for the land was known to any body but themselves and their families; and that, though Jackson went into possession, Mitchell also remained in possession. But from the relation of the parties, however this might tend to mislead a person dealing with Mitchell *afterwards*, these facts are not at all inconsistent with the purchase. True, they are facts which the jury had a right to weigh, and, therefore, it cannot be said that there is absolutely no evidence in favor of the verdict. Still, as facts authorizing Jackson to be discredited, they are of but little weight, and the Judge having granted a new trial, evidently upon the ground that the verdict was against the evidence, or that it was founded, perhaps, on some mistaken view of the effect, in law, of the want of a writing, or upon the fact of Mitchell's remaining in possession, we will not interfere with his judgment.

Judgment affirmed.

DANIEL R. MITCHELL, plaintiff in error, *vs.* COTHRANS & ELLIOTT, defendants in error.

A verdict of a jury, finding that the taxes on a debt contracted before June 1st, 1865, had not been paid, is on an immaterial issue, and under the decision of the Supreme Court of the United States in the case of *Walker vs. Whitehead*, it was error in the Court below to dismiss plaintiff's action for the non-payment of taxes under the Act of October 13th, 1870.

Constitutional law. Relief Act of 1870. Before Judge HARVEY. Floyd Superior Court. January Adjourned Term, 1872.

Daniel R. Mitchell brought complaint against Cothrans & Elliott on a promissory note, dated February 8th, 1861, due one day after the date thereof, for \$8,000 00, besides interest.

Various pleas were filed by the defendants unnecessary to be here set forth. The whole case was submitted to the jury, including the question whether the taxes on the debt had been paid, as required by the provisions of the Act of October 13, 1870. The jury returned a verdict finding that the taxes had not been paid. Whereupon, the Court dismissed the case, and the plaintiff excepted.

WARREN AKIN, for plaintiff in error.

SMITH & BRANHAM; UNDERWOOD & ROWELL, for defendants.

TRIPPE, Judge.

An issue was made and submitted to a jury, under the Act of October 13th, 1870, whether the taxes on the debt sued for had been paid by the plaintiff. The verdict was that the taxes had not been paid. The Court dismissed the case, and plaintiff excepted. In the case of *Walker vs. Whitehead*, taken from this Court by writ of error to the Supreme Court of the United States, that Court decided at its last term that the Act of October 13th, 1870, was in violation of that pro-

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vision of the Constitution of the United States which prohibits a State from passing any law impairing the obligation of contracts. I consider this decision as fully settling the much discussed question of the constitutionality of this Act. That was the only point made in the case of *Walker vs. Whitehead*. The case arose in one of the Superior Courts of this State. The defendant moved the Court to dismiss it because no affidavit of the payment of taxes had been filed. The motion was granted. That decision was affirmed by this Court, and by writ of error taken to the Supreme Court of the United States, and the decision thereon made as above stated. In the certified report of that decision the Court quotes all that portion of the Act touching the question, and say "a clearer case of a law impairing the obligation of a contract, within the meaning of the Constitution, can hardly occur."

When a question has been decided by a tribunal with authority to determine it, it is unnecessary to discuss the reasons for or against the decision. The Act being then unconstitutional, the verdict of the jury finding that the taxes on the claim had not been paid, was a verdict on an immaterial issue, and was no ground for the judgment of the Court below dismissing the suit.

Judgment reversed.

WARNER, Chief Justice, concurring.

In my judgment, the Act of the General Assembly of the 13th of October, 1870, denying to the plaintiff the aid of the Courts to collect his debt until the taxes thereon had been duly paid for each year, as required by the terms and provisions thereof, is unconstitutional and void for the reasons expressed in my dissenting opinions in the cases of *Walker vs. Whitehead*, 43 *Georgia Reports*, 553; *Allison, Anderson & Company vs. Graham*, 45 *Georgia Reports*, 355, and in my concurring opinion in *Lott vs. Dysart*, 45 *Georgia Reports*, 358. The case of *Walker vs. Whitehead* was taken up from this Court by writ of error to the Supreme Court of the United States, and has been recently decided by the unanimous judg-

ment of that Court. In delivering its judgment as to the validity of the Act of 13th October, 1870, the Court say that "a clearer case of impairing the obligation of a contract, within the meaning of the Constitution, can hardly occur." In the case of *Walker vs. Whitehead*, the question was distinctly made before this Court that the Act of 13th October, 1870, was void because it impaired the obligation of the contract in violation of the Constitution of the United States. The majority of this Court held, and decided, that the Act was a constitutional law, and did not impair the obligation of contracts as prohibited by the Constitution of the United States. That question was distinctly made in the record before this Court, and, as a matter of course, was as distinctly made in that same record when it was taken up to the Supreme Court of the United States by writ of error for review and adjudication there: See *Walker vs. Whitehead*, 43 *Georgia Reports*, 538. If the judgment of the Supreme Court of the United States had been in favor of the constitutionality of the law, the decision of that tribunal would have been an authoritative and binding decision upon *the question* involved, and I should unhesitatingly have acquiesced in it, because it would have been my plain duty as a judicial officer of the State, sworn to support the Constitution of the United States, to have done so.

But as the appellate tribunal has, in the exercise of its appropriate jurisdiction, declared the law in question *unconstitutional and void*, it is equally authoritative and binding upon the Courts of this State. And such was the opinion and judgment of this Court in *Mosely vs. Hogg*, 45 *Georgia Reports*, 599. After the Supreme Court of the United States had decided the question in the case of *White vs. Hart*, taken up from this Court, that the clause of the Constitution of 1868, which denied to the Courts of this State jurisdiction or authority to give judgment on or enforce any debt the consideration of which was a slave or slaves, or the hire thereof, was in violation of the Constitution of the United States, and, therefore, void, the case of *Mosely vs. Hogg* came before

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this Court in a suit on a note given for the hire of a slave. In concurring in the judgment of the Court in that case, my brother, McCAY, properly said: "I concur in the judgment of reversal on the sole ground that the Supreme Court of the United States having decided in the case of *White vs. Hart* that the 17th section, Article V., of the Constitution of 1868 is void, this Court is *bound* to conform its judgment to the decision and judgment of the appellate tribunal having jurisdiction of *the question*." In the case of *Walker vs. Whitehead*, the Supreme Court of the United States had the same jurisdiction of the question whether the Act of 13th October, 1870, was a valid constitutional law or not, as it had of the question in *White vs. Hart*, whether the 17th section of Article V. of the Constitution of 1868 was a valid or void law, and having decided *the question* that the Act of 13th of October, 1870, is an unconstitutional and void law, this Court is as much *bound* to conform its judgment to the decision and judgment of the appellate tribunal having jurisdiction of *the question* in *that case*, as it was in the case of *White vs. Hart*. If not, why not, is *the question* to be answered. The question involved in both cases for the decision of the appellate tribunal was the constitutionality or unconstitutionality of a State law according to the provisions of the Constitution of the United States. The question decided in *Walker vs. Whitehead* by the Supreme Court of the United States was, that the Act of the 13th of October, 1870, is an unconstitutional void law, and, consequently, does not affect or control the legal rights of anybody, either in this or any other Court. I am, therefore, of the opinion that the judgment of the Court below should be reversed.

McCAY, Judge, dissenting.

After much reflection as to my duty in these cases, I feel constrained to dissent from the judgment of the Court. I do not think the decision of the Supreme Court of the United States in the case of *Walker vs. Whitehead*, controls or should control any other case than that in which it was pronounced.

As a general rule, it is the duty of a Court, from whose judgments there is an appeal, to conform to what it has good reason to know will be the judgment of the appellate tribunal. It is also generally true, that a judgment in a similar case is good evidence of what will be the holding in other cases. For this reason I have not hesitated to conform my judgment in the slave debt cases, and in the homestead cases, to the opinions announced by the Supreme Court of the United States, in the two cases in which the laws of this State on those matters were declared unconstitutional, though I thought those opinions wrong. I think, however, the opinion of that Court, in the case of *Walker vs. Whitehead*, in which the validity of the Act of October 13th, 1870, in relation to the payment of taxes was questioned, does not stand on the same footing.

The jurisdiction of the Federal Court, by writ of error from a State Court, is, under the Constitution and laws, of a very limited character. Indeed, it exists, but for one purpose and upon one point—to-wit: when a State Court has given a judgment claimed to be contrary to the Constitution of the United States or to a law of Congress, in conformity with the Constitution. In the exercise of that jurisdiction the Court is confined to that question; and however wrong the judgment of the State Court may be on other points of the case, unless in *giving the judgment*, it has *enforced* a principle in violation of the Constitution, or contrary to an Act of Congress, the uniform rule of the Supreme Court is not to interfere. The jurisdiction rests upon the duty and the right of the proper branches of the Federal Government to enforce the Federal Constitution and the laws of Congress, passed in pursuance of it. It does not arise by virtue of any abstract power to declare a State law unconstitutional; but it turns upon the duty of the Court to reverse a judgment which is contrary to the Constitution and laws of the United States. Nor does it make any difference whether that judgment is based on a State statute or on a principle of the common law, or what not, still, if the State Court has, by any judgment it

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has made, violated the Constitution, or gone contrary to an Act of Congress, the jurisdiction arises. It follows from the very nature of the jurisdiction, therefore, that the construction given by the State Court to a State law is the very essence of the jurisdiction of the Federal Court. Its power to interfere is not against the law, but against the construction of the law by the State Court.

However plainly it may appear to the Supreme Court of the United States that the words of a State law contravene the Federal Constitution or Act of Congress, yet if the State Court has only enforced it under a construction which does not contravene the Federal law, the Federal Court cannot interfere. It may be added, though, this is only a necessary corollary from the nature of things, that the construction of the State law is with the State and not with the Federal Court.

To apply these principles to the case in hand. The Act of October 13th, 1870, enacted "that in all suits pending on a certain class of debts, it should be the duty of the plaintiff within *six months after the date of the Act*, to file an affidavit that all legal taxes due upon the debts sued on had been duly paid for each year since the making of the debt, and it provides that if this affidavit was not filed, the suit should be dismissed."

It is obvious that if this Act intended to say that if the plaintiff failed to swear that he had, at the proper time required by law, during the past year, paid the taxes, his case should be dismissed, it might be very positively said that here was a penalty for failing to do an act, which, at the time of the failure, had no such penalty. But it is equally obvious that if the Act means to give to the plaintiff six months, within which he may pay the tax, if he has not paid it; if the Act is to be construed to mean that all legal taxes have been duly paid at the time the affidavit is filed, the question would be a very different one. This Court gave the Act the latter construction. The opinion of the Court in *Walker vs. Whitehead* assumes this Court to have given it the former. In its decisions upon that Act, this Court has uniformly held that

the Act was not retrospective; that under our Code, section 866, any tax payer might give in and pay taxes due for former years, but not given in and paid at the proper time; that the Act of October 13th, 1870, only operated against those who failed and refused, after the passage of the Act, to pay to the State the taxes due, and that any person might, after the passage of the Act, pay the tax, and if he did so, he was not affected by the Act. And so construing and so enforcing the Act, we held it not in violation of the Constitution of the United States, that it was not an *ex post facto* law, or law impairing the obligation of contracts, because it gave to all persons affected by it a full and fair opportunity to pay the taxes and escape the operation of the law.

Had the opinion of the Court in *Walker vs Whitehead* declared that the Act of October 13th, 1870, was unconstitutional, even with this construction upon it, I should not have a word to say. I might think the judgment wrong, but I should conform to it, because upon such questions the Supreme Court is an appellate tribunal from this Court.

But the opinion in *Walker vs. Whitehead* does not do this. The Court in that case, ignoring entirely the construction this Court put upon that Act, puts a construction of its own upon it, and declares, with that meaning put upon it, the Act is unconstitutional, as it is in the nature of an *ex post facto* law. I am satisfied that this opinion of the Supreme Court was not made with a knowledge upon the part of the Court, of our tax laws, or of the construction put by this Court on the Act of October 13th, 1870.

It is well known as a fact that the case was not argued for the defendant in error. It is, besides, a settled rule of the Supreme Court that in such cases it will only pass upon the validity of the law, *as construed by the State Courts*, and that it holds itself bound by that construction. And this, not only because it is a proper rule, but because, by the Constitution and laws of the United States, the Supreme Court has no jurisdiction to pass upon a State law as an abstract thing, but only on such laws as they are expounded and enforced by the

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State Courts. The jurisdiction arises not upon the law, but upon its enforcement and upon the construction given to it by the State tribunals. It is not the custom of the Supreme Court of the United States, nor has it the legal or constitutional right to go behind the construction given to a State law by the State Courts to find a meaning to a law, and then to determine that as said law has such a meaning, it is void. If a question arises as to what a *contract is*—as, for instance, a charter—either Court will, *in such cases*, construe the law. But as to what is the meaning and proper construction of the law which is claimed to impair the contract, the construction of the State Court is conclusive. And this, as I have said, both because this is a proper rule and because the jurisdiction of the Federal Court is not over the law but over the enforcement of it.

Believing, therefore, as I do, that the decision in *Walker vs. Whitehead*, quoted here as binding authority was made without argument, and upon a construction of the Act of October 13th, 1870, already repudiated by this Court, and never in any case enforced by it; and, believing, as I also do, that if the case was properly presented the question really involved would be differently decided, I think this Court should adhere to its former ruling in these cases until the Act of 1870, as construed and enforced by this Court, is declared void.

The above decision disposed of the following cases, all of them involving the same question :

George Winston, administrator, *vs.* L. Gambrill; Charlotte Stallings *vs.* W. S. Chipley; The Central Railroad and Banking Company *vs.* H. S. Smith; M. E. Beall, executrix, *vs.* Buckner Beasley; B. Gibson *et al.* *vs.* Buckner Beasley; Stephen Williams *vs.* Frances R. Leonard; Stephen Williams *vs.* The Mayor and Council of Columbus; George Winston, administrator, *vs.* L. J. Benning, administrator; Thomas B. Wooten *vs.* Winter's Palace Mills; George Winston, administrator, *vs.* The Mayor and Council of Columbus; Stephen Williams *vs.* L. J. Benning, administrator; Solomon Adkins

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vs. E. Flewellen, administrator, *et al.*; Robert A. Lane *vs.* E. Flewellen, administrator, *et al.*; Chapman & Threewits *vs.* L. J. Benning, administrator, *et al.*; Chapman & Threewits *vs.* F. R. Leonard, administratrix; George Winston, administrator, *vs.* Francis R. Leonard, administrator; Chapman & Threewits *vs.* The Mayor and Council of Columbus; Andrew Park *et al.* *vs.* L. J. Benning, administrator, *et al.*; George Winston, administrator, *vs.* Frances R. Leonard, executrix; Thomas F. Brown *vs.* Amanda Robinson, administratrix—all from Muscogee county. Thomas Jones *vs.* Abner Snelson *et al.*, executors; V. A. Gasbill *vs.* Jesse Partridge *et al.*; William Warren *vs.* William F. Morris *et al.*; John R. Jones *vs.* Charles Tillman *et al.*—all from Meriwether county. John P. Key *vs.* R. A. Reid, administrator, from Putnam county.

D. W. SPENCE *et al.*, plaintiffs in error, *vs.* ENOCH STEADMAN, defendant in error.

1. In this case, we think, under the answers and the incontestible facts of the case, the Chancellor erred in enjoining the executions. They, and the connection of the defendants with them, had nothing whatever to do with the controversy growing out of the transaction in September, 1871. The defendants had a perfect right to buy them, and so far as appears by anything in these proceedings, they have a right to collect them.
2. It is a well settled rule of law that parties may, if they please, *really* and *truly* sell property for a consideration actually passing, and at the same time secure the right to repurchase it at a future time for an agreed price, and if this be really the intent of the parties, the law will enforce it. It is also true that the difference between such a transaction and a mortgage is often a very nice one, and that the Courts will scrutinize the matter very closely to discover whether there was, in fact, anything more intended than to provide a security for money due or advanced at the time, and all the facts will be looked to in search of the truth of the case. The great cardinal rule for testing the intent seems to be whether or not the relation of debtor and creditor was intended to exist between the parties—whether the property was taken in *satisfaction and discharge* of the sum due or advanced; or whether, notwithstanding

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ing the words of the conveyance, the relation of debtor and creditor was still to exist, to-wit: the right of the one to demand, and the obligation of the other to pay. Under this rule, we think, from the bill and answers, that the transaction begun in June, 1871, by the complainant's offer, and accepted and acted on by both in September, 1871, as evidenced by the complainant's proposal, the defendants' acceptance, and the deed, lease, bond and payments furnish, so far as appears from the face of the papers, or from any facts appearing at the hearing, taking the answers of the defendants as evidence, was a contract of sale, lease and agreement to permit the complainant to rebuy, and not a loan of money, and scheme to evade the usury laws; at least, that under the uncontradicted answers of the defendants, it was error in the Judge to have considered the charges of the bill so far made out as to justify the injunction on that ground. What may be the truth of the case, as it may be made out at the trial before a jury, is not now the question.

8. As it is admitted on all hands that the \$10,000 00 to be advanced for machinery has never, in fact, been advanced, and as it is perfectly apparent that this \$10,000 00 was in the minds of the parties in fixing the amount to be paid on the repurchase, and as from the bill, answers and other facts in the bill and papers before the Court, there is strong reason to believe that the rent was fixed at \$10,000 00, instead of \$8,000 00, in view of the expectation of all parties that this advance would be made and the complainant get the benefit of it under his lease, and as it is admitted that the complainant has paid the \$8,000 00 for the rent of 1872, according to his construction of the amount really intended by the contract; we are of the opinion that the facts, as they appear by the bill and answers, and by the proposition, lease and bond, justify the Court in considering the complainant to have made out such a *prima facie* case of compliance with the real intent of the lease as to authorize an injunction against his eviction for his failure to pay the \$10,000 00, instead of \$8,000 00, for the rent of 1872, and that the injunction against his eviction should be continued until the 1st of January, 1874, provided he keep the property insured, as agreed upon, and promptly pay \$8,000 00 rent for 1873, in quarterly payments, on the 1st of April, July and October, and the 31st of December, 1873, with the right to rebuy at the end of 1873, as provided in the bond, leaving the real truth of the amount of the rent for 1872 and 1873, as well as whether the transaction of September, 1871, was a mortgage or sale—the question of usury and the other questions made to be finally settled by the jury on the trial.

Mortgage. Sale. Conditional deed. Debtor and creditor.
 Injunction. Before Judge GREENE. Newton county. At
 Chambers. January 18th, 1873.

Enoch Steadman filed his bill against D. W. Spence and O. S. Porter, alleging, in substance, that in June, 1871, he was the owner of a large property in Newton county worth \$100,000 00, consisting of land on which was a cotton factory; that he was considerably in debt; that his debts were pressing and he was desirous to raise money; that with this view he made a written proposal to defendants to sell them his property at \$50,000 00, \$40,000 00 to be used for paying his debts, and \$10,000 00 to remain in defendants' hands to be invested in new machinery under his order. This written proposal stipulated that coterminous with the sale, defendants were to give a bond to resell him the property at the end of 1872 for \$50,000 00 cash, and to lease it to him for 1872 for \$10,000 00 rent, payable quarterly, with the further stipulation that if he paid the rent promptly, he was to have the right to keep the property, under lease, on the same terms, for 1873, and that the right to rebuy, in that event, was to be extended. It was further stipulated that complainant was to keep the property insured for \$30,000 00 during the lease. The bill stated that the defendants accepted the proposition, and that on the 19th day of September a deed, lease and bond were executed as proposed, the deed expressing \$40,000 00 as consideration; that the \$40,000 00 was not paid over to the complainant, but was left with defendants to be paid to certain judgments, etc., and other claims pressing complainant.

The bill further charged that the whole scheme was a mutual device to loan and borrow money at illegal interest and avoid the usury laws; that such was the intention of complainant, and that defendants participated in this purpose and intent.

The bill further charged that defendants had not paid the money to his debts, as they agreed; that they had bought up some at a discount; had other judgments transferred to themselves, and were about to levy them on his other property.

The bill further charged that the rent was fixed at \$10,000, because that was the amount of the interest agreed upon for \$50,000 00, to-wit: twenty per cent. The bill further charged

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that having determined not to increase the machinery as contemplated, he had never ordered it, and that the \$10,000 00 had never been advanced by defendants, as contemplated. The bill also showed that he had paid \$8,000 00 rent for 1872, to-wit: twenty per cent. on \$40,000 00, but that defendants claimed the whole \$10,000 00, and were threatening to eject him as a tenant holding over, unless he paid the same, as well as insisting that his right to rebuy, or lease for another year and then rebuy, was dependent on his payment of the whole of the said \$10,000 00 rent each year promptly. The bill then prayed that an account be had between them of the debt contracted, the usury and the payment, and offered to pay what might be found really due. The bill also prayed that the defendants might be enjoined from ejecting him and from levying any *fi. fas.* defendants might control on any of the complainant's property, and application was made to the Chancellor for an injunction until the final hearing. The Chancellor called on defendants to show cause, and they answered.

They admitted the written offer of complainant to sell, lease and rebuy, but positively denied that there was any agreement or understanding in any way that it was a loan of money; that it was a positive sale, just as stated in the deed, lease and bond, and no more or no less; denied that there was any intent expressed or understood that it was a loan or a device to evade the usury laws; denied that the money was not paid, but set up that either on the day of the transaction, or soon afterward, they had fully paid the \$40,000 00, dollar for dollar, to the complainant's debts, under his direction, and according to the agreement at the time; that they had paid the debts, dollar for dollar, and paid only such debts as complainant had directed, and that such debts and judgments had been settled (not transferred to them,) and turned over as settled by them to the complainant, and they set forth these payments, receipts, etc., in detail. They admitted that they had now in their control certain judgments against complainant, but stated that they had bought them with their own funds,

and to protect their property thus purchased, and insisted that they had a right to collect them from complainant's other property. They admitted that they had never advanced the \$10,000 00 for the new machinery, but said they had been ready to do it, but the complainant had never asked for it by ordering the machinery. They denied that the property was worth \$100,000 00, but insisted that it was worth little, if any, more than \$40,000 00. They offered several affidavits, especially that of the scrivener who wrote the papers sustaining the answers, as to the fact that a sale, and not a mortgage or security, was intended. The complainant also filed affidavits in aid of his charge as to the value of his property, as well as to some sayings of the defendants, to the fact that they did not want the property, but only to get good returns for their money and be safe.

The Chancellor granted the injunction as prayed, and the defendants excepted.

J. J. FLOYD, for plaintiffs in error.

B. H. HILL & SON; CLARK & PACE; SPEER & STEWART, for defendant.

McCAY, Judge.

A sale with an agreement to repurchase, or as is usually termed a conditional sale, though nearly allied to a mortgage, is yet very distinct in its effect, if the terms of the condition be not complied with. By the strict rules of the common law even in the case of a mortgage, if payment was not made according to the agreement, the estate was forfeited, and the title remained absolutely in the mortgagee. But Courts of equity, taking into consideration the important fact that it was not the intent of the parties to sell, but only to secure the payment of a debt, came to the relief of the mortgagor and gave him the right of redemption even after condition broken. The fundamental idea of the doctrine of the equity of redemption in a mortgagor, was that it was not the *intent* of the parties to sell and buy—that the transaction was, in truth, an arrange-

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ment to secure the payment of money, and that on the payment of the money due, with lawful interest, the whole intention of the parties was complied with. But when cases arose in which it appeared that the loan or security of money was not the intent, but that there was a real intent to sell and fix a condition of repurchase, which might or might not be afterwards performed by the mortgagor, all the foundation for the interference of equity was gone, and the parties were necessarily left to their contract as they made it. In reference to a conditional sale, Chief Justice MARSHALL, in *Conway vs. Alexander*, 7 Cranch, 237, says: "To deny the power of two individuals capable of acting for themselves, to make a contract for the purchase and sale of lands, defeasible by the payment of money at a future day, or in other words, with a reservation to the vendor of the right to repurchase the same land at a fixed price and at a specified time, would be to transfer to the Court of chancery, in a considerable degree, the guardianship of adults as well as infants."

Such contracts may be made under circumstances, and by words, which not only make the intent plain, but show that such intent was the natural and probable course for the seller to take under the circumstances. It is unquestionably sometimes difficult to determine what was the real intent. Men having money to lend, or debts to secure, not unnaturally desire to put the debtor under as strict and heavy terms as they can exact from his necessities; and thus, often, when the real intent is *only security*, they obtain instruments having all the forms of a conditional sale. It is, therefore, a settled rule that the mere form of the paper—the words used—such as purchase, sale, repurchase, etc., if the real intent be only to secure the payment of money, will not make the instrument other than a mortgage: 4 Kent's Com., 144. And equity will lean to the construction that will give to the vendor the right to redeem: 23 Pickering, 529. In 6 Watts, 131, Judge GIBSON says, it is too late to say that what was intended to be a security for money may become a conditional sale by the accidental form of the transaction, or that an agreement to make

it such, in default of payment, may not be relieved against, or that a jury are not the proper judges of the intent."

The great question in every such case is, what was the intent of the parties? We are very clear, from the *answers and affidavits* here, that it was the intent to make a conditional sale—that the relation of debtor and creditor did not at any time exist, and that if, at the end of the first or second year, Steadman fails to buy, these parties have no remedy against him. If the property burns up, if the dam breaks, if Steadman refuses to insure the property, the whole risk is on the part of the defendants. Steadman does not owe them a dollar except for rent. If the mills should, as we have said, get burned up, and the defendants lose in any way the insurance, which at best is only three-fourths of the value, they have no right to go on Steadman for any debt but the rent. In fact, the relation of debtor and creditor does not and never did exist between them. Now, if this is a mortgage as to Steadman, it is a mortgage as to the defendants, and he owes them the amount of their payments with interest. It seems to us that all the facts indicate that such was not the intent of the parties. There was a better way to secure money than that. Some of their money was already better secured. They had judgments for it, and it was easy to put their whole payment in that shape by paying and taking a transfer of the other judgments which their money *discharged*.

As a matter of course, we do not say, or undertake to say, what a jury may find in the proof as it will be made on the trial. The question of intention is one of fact, to be decided from all the circumstances, including the papers. It is impossible to lay down any accurate, rigid rule by which to ascertain the motives of the parties. They are to be gathered from all the circumstances. Even the papers are open to contradiction by parol, though in this State, if *the possession has changed*, a deed absolute on its face cannot be shown to be a mortgage, unless, indeed, fraud in its procurement is the issue: See Revised Code, 3756.

In this case Steadman remained in possession, for if the real

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intent was only to secure the payment of the money which these defendants advanced to take up the executions, or which was due them on the executions they held, and which they entered satisfied, we do not think the putting the interest in the shape of rent, and the agreement that Steadman should be the tenant of the defendants, would change the possession. A lease is consistent with the relation of mortgagor and mortgagee. Hence a lease does not change a mortgage to a conditional sale: See *Kunkle vs. Wolfersberger*, 8 Watts, 131. And we think that section of the Code, denying the right of showing by parol that an absolute deed was intended as a mortgage, when the deed is accompanied by the possession of the property, means an actual possession, and not that sort of possession which consists in agreeing to hold possession for the grantee in the deed. The statute evidently recognizes the formal change of possession as an *act* indicating on the part of the grantor in the deed, by the deliberate abandonment of his own possession, that his agreement is fully expressed in the deed. The consent to be the tenant of the grantee is only another term of the agreement, and is not an act in *furtherance* and in pursuance of the agreement indicating that it is in truth what it purports to be.

As we have said, the whole question is one of intent. If Steadman's account of the transaction, as contained in the charges in the bill, be the true one, the intent was, doubtless, a mere device to secure money and to get illegal interest. But if the answers of the defendants, and the decided weight of the affidavits, state the truth of the case, then it was almost certainly a conditional sale. The form of the papers, the words used, the acts of the parties at the time, as the absence of any evidence of debt as a note or bond, the satisfaction of the judgments, the taking of receipts from Steadman, the want of any great disparity between the real value and the amount paid by the defendants, and the strong, decided, positive statements of the answers, and the affidavit of the scrivener who wrote the papers, are, so far as the issue of injunction or no injunction is concerned, very strong in favor of a conditional sale.

On the other hand, there is really nothing but the statements of the complainant and the general suspicion which, in the nature of things, must attach to all such transactions. The strongest view of the case for the defendants is, to our mind, the evident intent that the right to repurchase is optional with Steadman. He may buy back, if he pleases; or if he pleases, he may not.

If, at the end of the first or second year, the property is still worth the money, and he is able, he has, by the bargain, the right to repurchase; but if the property has depreciated, or if he thinks he can do better in some other way with his money, he can let it alone. Even Steadman, himself, does not, in his own statements, say or pretend that the intent was otherwise than this. If this was the truth of the transaction—if it was, in fact, simply a contract of sale, with a *right*, an *option* in Steadman to rebuy, with no corresponding right, either express or implied, in the other parties to insist on the repayment of the money—then it was not a mortgage. We do not mean that there shall be an express stipulation of this right to the lender. If the facts, the nature of the transaction indicates it, that would be sufficient. There may be, too, when the case comes to a trial, something added by the proof to the charges in the bill, that, whether there was any agreement in terms of a loan or not, the real intent of the whole transaction was to evade the usury laws; not to make a mortgage, in terms, either in writing or by parol, but to violate the law against usury, and thus bring the transaction within the usury law, so as to make it void.

But as the bill, answers and affidavits now before us make the case, it seems to us almost impossible to escape the conclusion that the intent was *to sell* and *to buy*, giving to Steadman the right to rebuy. He had a right to make such a bargain, if he pleased. If, with his eyes open to the risk he was running, he did, in fact, sell his property, then rent it, intending or giving the others to believe that he intended, in reality, to sell, and to reserve the right to rebuy if he saw fit, he has made his own bed and must lie down under it. As we have

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said, under the evidence before us, that appears to have been the intent of both parties, and for this reason, we think the injunction ought not to have been granted, as prayed for.

As to the executions sought to be enjoined, the answers are so positive, decided and specific (and there is nothing in any of the affidavits contrary to them,) that unless the rule that the defendant is entitled to the benefit of his answer in the granting or dissolving an injunction is to be entirely disregarded, we see no reason for the injunction. All the moneys covered by the original trade are fully accounted for by receipts under the complainant's own hand, and the ownership of these *fi. fas.* seems almost without question to be in the defendants, by purchase and transfer, entirely independent of the contract originally made. We think the injunction as to these *fi. fas.* is entirely improper, and that there is nothing in any of the facts appearing at the hearing to justify the Court in staying the regular process of the law, as to them, however hard it may be.

We think, however, there is ground for an injunction. It is very apparent that the defendants have avowed their intention to insist on the payment of the full \$10,000 00 rent. And if complainant fails to pay that, they have given him notice that they will treat the condition as broken. Perhaps, by the strict letter of the contract, they are right, but one cannot but feel, on the reading of the contract itself, that the additional machinery to be bought with the \$10,000 00 was a large ingredient of the rent. That money has not, in fact, been paid. The defendants still have that money, and the complainant has not got the benefit of it. And, whilst we have some doubt of the power of a Court to interfere, yet, under the circumstances, we think the defendants ought to be restrained from insisting on more rent for 1872 than has already been paid; at least, that he be not allowed to take possession for non-compliance with the conditions until a jury can, on regular proof by both parties, pass upon the issue.

Judgment reversed, with instructions.

LOYD G. BOWERS, plaintiff in error vs. WILLIAM M. ANDERSON, administrator, defendant in error.

In a parol contract by an agent for the purchase of ninety-two bales of cotton then packed and pointed out, at a stated price per pound, estimating the bales at five hundred pounds each, subject to correction, on weighing, it was also verbally agreed that the seller should haul the cotton to a certain place for the buyer; that if it was burned it should be the loss of the buyer; that the agent need not pay the money, but hold it for the buyer to check on as he might want it, and *no act* was done by either party as to the payment or delivery, and the seller afterwards refused to deliver the cotton, and the agent returned the money to his principal:

Held, That this did not make a case of actual receipt by the buyer, or of payment, as required by the 17th section of the statute of frauds, so as to render the seller liable in an action of trover for the cotton. No merely verbal stipulations in the contract, and as part of the contract, are sufficient to take it out of the statute.

Statute of frauds. Sale. Part performance. Delivery. Before Judge ALEXANDER. Pulaski Superior Court. April Term, 1872.

Lloyd G. Bowers brought trover against William W. Mayo for ninety-two bales of cotton, of the value of \$20,500 00. The defendant pleaded the general issue and the statute of frauds.

Pending the litigation the defendant died, and Anderson, his administrator, was made a party.

The facts were as follows: In May, 1862, John M. Kibbee, as the agent of the plaintiff, went to Mayo's residence, at his instance, for the purpose of purchasing some cotton. They agreed upon the terms. The cotton was packed and pointed out, making ninety-two bales, each bale being estimated as of five hundred pounds weight. Any variance from this estimate was to be adjusted when the cotton was weighed. The cotton was to remain where it was at the gin-houses, under Mayo's care, free of storage, until hauled away, at plaintiff's risk. Kibbee stated that if it was burned on the night of the sale, it would be plaintiff's loss. The price agreed upon was

seven and a half cents per pound. Kibbee offered the money to Mayo, but the latter requested him to keep it subject to his check, as he did not like to keep so much money at home. The plaintiff was at once notified by Kibbee of the purchase, and had the cotton insured. The cotton was sampled before the purchase and would class "low middling." It was also agreed that if the cotton should remain in the possession of Mayo until his crop was laid by, he would haul it to Hawkinsville free of charge, otherwise the plaintiff was to pay for the hauling. Upon demand, Mayo refused to deliver the cotton. Kibbee returned the money which was to be paid for it to the plaintiff.

The jury returned a verdict for the defendant. The plaintiff moved for a new trial upon the following, amongst other grounds:

1st. Because the verdict was contrary to the law and the evidence.

2d. Because the Court erred in charging the jury "that the general rule of law applicable to the title to personal property under a sale, is this: Where the plaintiff claims title to goods under a sale, and a question is made as to the time when the property passed, it will be material for him to prove that everything that the seller had to do was already done, and that nothing remained to be done, but to take away the specific goods. They must have been weighed or measured and specifically designated, and set apart by the vendor, subject to his control, the vendor remaining at most a mere bailee."

The motion for a new trial was overruled and the plaintiff excepted.

S. HALL; HANSELL & HANSELL; JACKSON, NISBET & BACON; C. C. KIBBEE, for plaintiff in error.

LANIER & ANDERSON, for defendant.

TRIPPE, Judge.

It is not necessary to the decision of this case to determine whether the charge of the Court was or was not strictly accurate and correct. There are many decisions going that far and which state the principle as given by Judge ALEXANDER: *Hanson vs. Meyer*, 6 East. R., 614; *Wallace vs. Breeds*, 13 *Ibid.*, 522; *Simmons vs. Swift*, 5 B. & C., 857; *Barrett vs. Goddard*, 3 Mason, 112; *Allman vs. Davis*, 2 Iredell, 12; and Mr. Selwyn affirms the rule to be as drawn from *Whitehouse vs. Frost*, 12 East., 614, that if anything remains to be done on the part of the seller as between him and the buyer to ascertain the price, quantity or individuality of the goods before delivery, a right of property does not attach in the buyer.

The rule as stated has been quite strongly questioned by a writer in 1 *American Law Review*, 413-431 and authorities quoted, and reasons given why, as it is claimed, the principle has been too broadly announced. I am not inclined to join issue with the positions assumed in the article referred to nor is it necessary that it should be done. It may be true, that there may be cases where the property passes without a delivery—without the weight being ascertained or without the aggregate price being ascertained, but it must appear to be the intention of the parties; the goods must be ascertained, there must be a valuable consideration and the contract must satisfy the statute, either by part or entire payment, or earnest, or by acceptance and delivery of part or the whole, or by a writing duly signed. But the question here turns on another point.

This case was founded on a contract alleged to have been made in 1862, before the Code went into operation, so that it is to be decided under a construction of the 17th section of the statute of frauds. It is not intended by this to intimate that the case would be different if it arose under the provisions of the Code, but to assert it to be just what it is, a case controlled by the statute of frauds. The 17th section of that statute re-

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quires that a contract for the sale of goods for the price of £10 or upwards, in order to convey the title to the goods, must be accompanied with proof, either that part of the goods sold has been accepted and *actually received*, or that something has been given in earnest to bind the bargain, or in part payment, or that a note or memorandum, in writing, of the bargain must be signed by the parties to be charged by the contract or their agents: Benjamin on Sales, 68. The intent of the statute was to prevent the enforcement of contracts above a certain value, unless the defendant could be shown to have executed the alleged contract by partial performance, as manifested by part payment, or part acceptance, or unless his signature to some written note or memorandum of the bargain—not to the bargain itself—could be shown: *Ibid.*, 147. Or, in other words, the rule may be said to be that, in order to make such a parol contract binding, so as to pass title, there must be something beyond the mere words of the contract. To hold that the statute could be satisfied by the parties to the contract verbally stipulating in the contract and as part of it, that the goods should be considered as held by the seller as bailee for the purchaser, or that the price should remain with the buyer as the depositary of the seller, would destroy its whole virtue. It would allow a contract to be enforced which at last would only exist in *words*, the words that made it, without an *act* by either party towards its performance, or without a line of writing to prove it. The statute requires one or the other.

It has been often stated as being now finally determined that the goods may remain in the possession of the seller, *if he assume* a changed character, and yet be actually received by the buyer; that it may be agreed that the seller shall cease to hold as owner, and shall assume the character of bailee or agent of the purchaser, thus converting the possession of the seller into that of the buyer through his agent. This is so laid down by Mr. Benjamin in his work already quoted from, page 130.

On examining the cases referred to, it will be found that

there was something in nearly every one besides the mere *verbal* agreement of the parties that the seller should assume a changed character. There was an *act* done or performed by one or the other of the parties, or by both, which formed a marked feature in the transaction.

The first case referred to is *Chaplain vs. Rogers*, 1 East., 195, where it was held that a stack of hay remaining on the vendor's premises was actually received by the purchaser; but this was on the ground that the buyer had re-sold a part of it to another person, who had taken away the part so purchased by him.

In *Beaumont vs. Brengeri*, 5 C. B., 201, the defendant had bought a carriage, which remained in the plaintiff's shop by request of defendant. The plaintiff had a verdict, but it was in evidence that defendant had ordered certain alterations made—had sent for the carriage and took a drive in it, after telling plaintiff he intended to take it out a few times so as to make it pass for a second hand carriage on exportation. The decision was put on the ground that the defendant had assumed to deal with it as his own, had accepted it, although it had been sent back and left in plaintiff's shop.

So it will be found in most, if not all, of the cases which are referred to in support of the broad proposition, as stated above, that there was something more than a mere verbal agreement as to the character in which the seller was to hold the property. The case generally cited as the leading one on this point is *Elmore vs. Stone*, 1 Taunt., 458. There the purchaser of horses from a dealer left them with the dealer to be kept at livery for the buyer. Sir JAMES MANSFIELD, delivering judgment, held that as soon as the dealer had consented to keep the horses at livery, his possession was changed, and from that time he held, not as owner, but as any other livery stable keeper. In this case, the fact was that the seller kept both a sale and a livery stable, and in compliance with the request of the buyer, transferred the horses from the sale stable to the livery stable. It is true it is stated in the judgment that this fact did not affect the case; but strike it out,

and it is difficult, if not impossible, to sustain the decision on principle or authority. And the case has been doubted in *Howe vs. Palmer*, 3 B. & A., 324, and *Proctor vs. Jones*, 2 C. & P., 534, and subsequent decisions have virtually overruled it.

The case of *Walker vs. Nussey*, 16 M. & W., 302, was this: An agreement for the purchase of goods, exceeding £10 in value, was made, with the understanding and as part of the contract, that the vendor should deduct from the price the amount of a debt due by him to the purchaser. The vendor then sent the goods to the purchaser, with an invoice, charging him with the price, £20 18s. 11d., under which was written, "By your account against me, £4 14s. 11d." The purchaser returned the goods as inferior to sample. It was contended on behalf of the vendor, who brought an action for goods sold and delivered, that this credit of £4 14s. 11d. was a part payment of the price, sufficient to take the case out of the statute: *Held*, Not to be so. Platt, B., said, "You rely on part of the contract itself as being part performance of it." Pollock, C. B., said, "Here was nothing but one contract; whereas, the statute requires a contract, and if it be not in writing, something besides." Parke, B., and Alderson, B., also added statements equally as clear and strong, all showing their unanimous opinion that no mere words in a contract, and which are part of it, will satisfy the statute. Indeed, if that could be done, the statute for all beneficial purposes might as well be stricken from the book.

I will refer to but one more case—that of *Shinohr vs. Houston*, 1 Comstock, 261. It seems to have been thoroughly considered, having gone up to the Court of Appeals of New York, from a decision of the Supreme Court, which last is reported in 1 Denio, 48. The judgment of the Supreme Court was reversed, BRONSON, Judge, who had presided as one of the Judges in the Supreme Court and who concurred in the first decision, now concurring in overruling it. It was held, "that to constitute a delivery and acceptance of goods such as the statute requires, something more than mere words

is necessary. Superadded to the language of the contract there must be some *act* of the parties amounting to a transfer of the *possession* and an acceptance thereof by the buyer." GARDNER, Judge, said, "The declarations relied upon as evidence of a delivery and acceptance, constitute a *part* of the *contract*, and of course are obnoxious to all the evils and every objection against which it was the policy of the law to provide." BRONSON, Judge, said, "Mere words of contract, unaccompanied by any act, cannot amount to a delivery. To hold otherwise, would be repealing the statute." GARDNER, Judge, said, "So far as I have been able to look into the numerous cases that have arisen under the statute, the controlling principle to be deduced from them is, that when the memorandum is dispensed with the statute is not satisfied with anything but unequivocal acts of the parties; not mere words that are liable to be misunderstood and misconstrued, and dwell only in the imperfect memory of witnesses. The question has been, not whether the words used were sufficiently strong to express the intent of the parties, but whether the *acts* connected with them, both of seller and buyer, were equivocal or unequivocal." Numerous other decisions are to the same effect, but the above with the extracts given are sufficient.

We find nothing in the record which shows any contract between these parties but a verbal agreement. There is not an *act* of either party proven in connection with that contract, showing performance or part performance—nothing showing payment or delivery and acceptance, except what is part of the *verbal* contract itself, and which was done *by words*. The purchaser, it is true, insured the cotton, but that was an act of his own, not by the direction or knowledge of the seller.

It is not necessary to notice, in this connection, the doctrine of constructive delivery, such as where the seller by some act relinquishes his dominion over the property and puts it in the power and control of the buyer. For instance, the delivery of the key of a store-room or warehouse, or other place where the goods are deposited, or directing a bailee who has the goods in possession to deliver them to the buyer, and which,

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by the assent of the bailee and the purchaser, are thence held as the property of the new owner. In such cases there is, in addition to the words of the bargain, an act of both parties, by which the dominion over the goods is transferred from the seller to the buyer. But here there was no delivery, actual or symbolical.

Upon the whole, whether the charge of the Court was or was not strictly accurate, there is no evidence in the record to take the case out of the statute, and the verdict was a legal necessity under the testimony.

Judgment affirmed.

CASES
ARGUED AND DETERMINED

IN THE

Supreme Court of Georgia,

AT ATLANTA,

JULY TERM, 1873.

PRESENT—HIRAM WARNER, CHIEF JUSTICE.

H. K. McCAY,
ROBERT P. TRIPPE, } JUDGES.

WEST END AND ATLANTA STREET RAILROAD COMPANY,
plaintiff in error, vs. ATLANTA STREET RAILROAD COM-
PANY, defendant in error.

1. Where a charter, granted by the General Assembly to a private corporation, is silent as to the time of its continuance, it will expire thirty years from its date.
2. It is a well established rule of law that an exclusive grant in derogation of common rights, as well as in all cases in which exclusive rights are claimed under a legislative grant to a corporation, that such grant should be strictly construed, and that nothing is to be intended beyond the express words contained in it.
3. On the 23d of February, 1866, the General Assembly of this State passed an Act incorporating the Atlanta Street Railroad Company. By the 2d section of said Act it is declared, "That said company shall have exclusive power and authority to survey, lay out, construct and equip, use and employ, street railroads in the city of Atlanta, subject to the approval of the City Council thereof, for each route selected, first had and obtained, before the work thereon shall be commenced :

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Held, That there are no words in this charter which grants to the complainant's company the unconditional, exclusive power and authority to construct and use street railroads in *all* of the streets of the city of Atlanta, but that the grant is limited and restricted to *each route* that may be selected by the company in the streets of the city of Atlanta, which shall be approved by the City Council thereof.

4. The complainant cannot derive any benefit from the general ordinance of the City Council, granting authority to its company to construct street railways on any street in the city, and across the bridge on Broad street, because that ordinance is void, not having been passed in pursuance of the requirements of the charter, as there had been no route for a street railway selected by the company and submitted to the City Council for its approval on any street in the city, as prescribed by the charter of the company, and until that had been done the City Council had no power or authority under the charter to give its approval in advance before any route had been selected by the company and submitted for its approval.
5. The laws which exist at the time and place of the making of a contract, enter into and form a part of it.
6. Where exclusive authority is vested by the General Assembly in a private corporation by its charter, under the general law of the State, said body retains the power to modify or restrict said exclusive grant.
7. The power to withdraw an entire franchise necessarily includes the power to modify or restrict the exercise of it.
8. An affirmative statute is a repeal by implication of a precedent affirmative statute, so far as it is contrary thereto.

Injunction. Corporations. Charter. Statute of limitations. Construction of statutes. Laws. Repeal. Contracts. Before Judge HOPKINS. Fulton County. At Chambers. July 30th, 1873.

For the facts of this case, see the decision.

B. F. ABBOTT; CLARK & GOSS, for plaintiff in error.

B. H. HILL & SON, for defendant.

WARNER, Chief Justice.

This was a bill filed by the complainant against the defendant, praying for an injunction to restrain the defendant from constructing, equipping or operating any street railway in any street of the city of Atlanta. On hearing the motion on the

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bill, answer of defendant and exhibits attached thereto, the presiding Judge granted the injunction prayed for. Whereupon, the defendant excepted.

On the 23d day of February, 1866, the General Assembly of this State passed an Act incorporating the Atlanta Street Railroad Company. By the second section of said Act it is declared, "That said company shall have exclusive power and authority to survey, lay out, construct and equip, use and employ street railroads in the city of Atlanta, subject to the approval of the City Council thereof, for *each route selected* first had and obtained, before the work thereon shall be commenced." This charter being silent as to the time of its continuance, it will not expire until thirty years from its date: Code, section 1677.

On the 26th day of August, 1872, the General Assembly passed an Act incorporating the West End and Atlanta Street Railroad Company. By the 3d section of that Act it is declared, "That said company shall be entitled to all the powers and privileges of the Atlanta Street Railroad Company, and subject to the same liabilities and restrictions." That is to say, the West End and Atlanta Street Railroad Company shall have the exclusive power and authority to survey, lay out, construct and equip, use and employ, street railroads in the city of Atlanta, subject to the approval of the City Council thereof, for *each route selected*, first had and obtained, before the work thereon shall be commenced. It will be noticed that neither company has the exclusive power and authority, under the respective charters, to construct and use any street railroads in the city of Atlanta, until the route has first been selected by it and approved by the City Council thereof.

The complainant alleges that it has already in operation eight miles of street railroad at a cost of \$140,000 00, but does not allege on what streets or routes the same have been selected or located, nor is it alleged that any particular street or route has been selected by it for a street railroad in the city and been approved by the City Council, as required by its charter. It is true, the complainant alleges that before

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commencing work on said streets, it made an application to the City Council of said city for their approval, according to the terms of the charter, and said city did approve the same in the following words, which is a copy of the ordinance of the City Council: "Authority is hereby granted to the Atlanta Street Railroad Company to construct street railways on any street in the city, and across the bridge on Broad street." On the 27th June, 1873, the defendant petitioned the City Council to allow it to construct and use a street railroad in the city of Atlanta, under its charter, from the passenger depot to the Ponce de Leon Springs, which was granted by the City Council, specifying the route and the streets on which it was to be constructed, which route and streets are not occupied and used by the complainant's street railroad, and it is the construction and use of a street railroad on this selected route by the defendant, that complainant seeks to enjoin. The complainant insists that under its charter the General Assembly have granted to it the unconditional *exclusive* franchise to construct and use street railroads in *all* of the streets of the city of Atlanta, for the term of thirty years, that being the time of the duration of its charter under the law; that, upon the acceptance of the charter by the company, it became an executed contract which the Legislature could not impair by granting another charter to the defendant, and if the Legislature could do so for the benefit of the public, then it could only do it by making just compensation. These general legal propositions contended for are recognized and admitted, provided the complainant has the unconditional, *exclusive* right of franchise granted to it by its charter, to construct and use street railroads in *all* of the streets of the city of Atlanta.

It is a well established rule of law, that exclusive grants in derogation of common right, as well as in all cases in which *exclusive* rights are claimed under a legislative grant to a corporation, that such grant should be *strictly* construed, that nothing is to be intended beyond the express words contained in it. Applying this rule of construction to the complainant's grant as expressed in its charter, does it give to it the uncon-

ditional, exclusive right to construct and use street railroads in *all* of the streets of the city of Atlanta for thirty years? Or, is the grant in the charter restricted and limited to the exclusive right to construct and use such street railroads only for each route selected by the company *in* the streets of the city of Atlanta as may be approved by the City Council thereof? If the complainant's company have the exclusive franchise as claimed under its charter, then it is entitled to the protection of the law, however great a monopoly it may be. The words of the charter are: "That said company shall have the exclusive power and authority to survey, lay out, construct and equip, use and employ, street railroads *in* the city of Atlanta, subject to the approval of the City Council thereof, for *each route selected*, first had and obtained, before the work thereon shall be commenced."

In our judgment, there are no words in this charter which grants to the complainant's company the unconditional, exclusive power and authority to construct and use street railroads in *all* of the streets of the city of Atlanta, but that the grant is limited and restricted to *each route* that may be selected by the company *in* the streets of the city of Atlanta, which shall be approved by the City Council thereof. When each route for the street railroad has been selected by the company in one or more streets *in* the city, and approved by the City Council thereof, then the company have, under the grant in the charter, the exclusive power and authority to construct and use street railroads on each route so selected and approved, and that is the extent of the grant. The exclusive grant to construct and use street railroads on *each route* that may be selected *in* the streets of the city, and approved by the City Council, is one thing; the exclusive grant to construct and use street railroads in *all* the streets of the city for thirty years, is another and quite a different thing, as will be readily perceived. The complainant cannot derive any benefit from the general ordinance of the City Council granting authority to its company to construct street railways on any street in the city, and across the bridge on Broad street, because that ordinance is void, not

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having been passed in pursuance of the requirements of the charter. There had been no route for a street railway selected by the company and submitted to the City Council for its approval, on any street in the city, as prescribed by the charter of the company, and until that had been done, the City Council had no power or authority, under the charter, to give its approval in advance, before any route had been selected by the company and submitted for its approval. The City Council, under the charter, were to approve of *each route* selected by the company for the construction and use of street railroads in the city, when the same should be submitted by the company for their approval, and not until that had been done. The argument for the complainant is, that it has the exclusive right granted to it by the charter to construct and use street railroads in *all* of the streets in the city for thirty years, whenever it shall select a route therefor, and obtain the approval of the City Council. This construction of the grant would place it entirely in the power of the company to construct only such street railroads in the city as it might think proper, and to disregard the wants and convenience of the citizens in every other part of the city for thirty years. Can it be possible, or even probable, that the General Assembly intended *that* in making the grant? Is it not more reasonable to say, in construing the grant, that it was the intention of the Legislature that the company should have the exclusive right to construct and use such street railroads only in the city, *each route* of which it had selected, and obtained the approval of the City Council?

The grant is not the exclusive power and authority to construct and use street railroads in *all* the streets of the city for thirty years, but the grant is to construct and use street railroads in the city, subject to the approval of the City Council thereof for *each route selected*, first had and obtained, before the work thereon shall be commenced; and to *each route so selected* and approved, the company shall have the exclusive right to construct and use street railroads *thereon* for thirty years.

The intention of the Legislature as to the exclusive right claimed to have been granted to construct and use street railroads in *all* the streets of the city, is not doubtful, when viewed in the light of the Act of 1872, for we cannot impute to that body an intention to impair a grant which they had previously made, which we must do in order to sustain the construction contended for. If the Legislature had thought that the complainant's company had the exclusive right to use and occupy *all* the streets in the city under its grant, as claimed, they would not have made the grant they did to the defendant's company. To construe the grant to the complainant's company as vesting in it the exclusive right to construct and use street railroads in *all* the streets of the city, will be to contravene the expressed intention of the Legislature and give to that company an exclusive monopoly over *all* the streets in the city for thirty years as to the construction and use of street railroads therein, to be exercised at the pleasure or caprice of the company; it may select what routes it pleases for the approval of the City Council, or not use and occupy any more than it has already done, in defiance of the public welfare and interest of the city, if it shall be its pleasure or interest to do so. To limit the construction of the grant in each charter to such routes in the city as each company may select and the City Council approve, will best protect the interest of the public, maintain the legal rule as to the construction of grants, and give effect to both Acts of the General Assembly. The selection of routes in the city by either company, in the streets thereof which are not occupied, with the approval of the City Council, will accomplish just what the Legislature intended should be done in the construction and use of street railroads in the city of Atlanta. Construing both these Acts together, and the grants contained in each of them, it is clearly apparent that it was not the intention of the Legislature to grant to either company the exclusive right to construct and use street railroads in *all* the streets of the city for thirty years, but the grant to each is the exclusive right to construct and use only such routes in the streets of the city as each may se-

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lect with the approval of the City Council. The Legislature did not intend to create an exclusive monopoly of all the streets by either company for thirty years, and the Courts should not do it unless the words of the grant are so clear and definite as not to admit of any other construction. If, however, the General Assembly of 1872 were mistaken as to the extent of the exclusive powers which had been granted to the complainant's company in the Act of 1866, and that the exclusive power now claimed had in fact been granted by that Act, was it competent for the Legislature of 1872 to modify or restrict that exclusive grant of power under the general law of this State as it existed at the time of the grant and the acceptance thereof by the company, and has it done so by necessary implication according to the cardinal rule for the construction of statutes as recognized by this Court? The Code took effect on the 1st day of January, 1863, and the 1681st section thereof declares, that "In all cases of private charters hereafter granted, the State reserves the right to withdraw the franchise, unless such right is expressly negatived in the charter." This section of the Code introduced a new element into the law of private corporations in this State, and all charters granted by the State to private corporations since its adoption, are subject to its provisions.

When the company accepted the grant made by the General Assembly, it did so with a full knowledge of this general law, as much so as if it had been inserted in the Act incorporating the company, and it is a well established rule that the laws which exist at the time and place of the making of a contract, enter into and form a part of it. The complainant's company, therefore, accepted the charter, subject to the right of the State to withdraw, modify or restrict the franchise granted to it whenever the State should think proper to do so. The power to withdraw the entire franchise granted, necessarily includes the power to modify it, or to restrict the exercise of it, and the question is, whether the General Assembly, by the passage of the Act of 1872, has modified or restricted the complainant's franchise, as claimed under the Act of 1866,

even if it was *exclusive*, to construct and use street railroads in *all* the streets of the city of Atlanta for thirty years? The grant to the defendant's company to construct and use street railroads in the streets of the city is directly repugnant to, and inconsistent with, the grant to the complainant's company to have the exclusive right to construct and use street railroads in *all* of the streets of the city, and if the complainant's company did have the exclusive franchise, as claimed under the Act of 1866, that exclusive franchise is modified or restricted *pro tanto*, by necessary implication, by the Act of 1872. Both Acts cannot stand and be operative, with the exclusive right of franchise claimed for the complainant's company, any more than two solid bodies could occupy the same space at the same time.

In the case of *The Union Branch Railroad Company vs. The East Tennessee and Georgia Railroad Company*, 14 *Georgia Reports*, 328, this Court held and decided that an Act of incorporation, in which the Legislature have reserved the right of repeal, may be repealed by implication, upon the principle that every affirmative statute is a repeal, by implication, of a precedent affirmative statute, so far as it is contrary thereto. Our conclusion, therefore, is, that if the complainant's company had had the exclusive right granted to it by the Act of 1866, as claimed, that it was competent for the General Assembly, under the general law of the State, to modify and restrict that grant as it did by the passage of the Act of 1872, which repealed all laws in conflict with the provisions of that Act. This did not impair the complainant's contract, under its charter with the State, because it made the contract in view of the general law of the State, which entered into and formed a part of it. The complainant's company and the defendant's company, under the two respective Acts of the General Assembly, each for itself, has the exclusive power and authority to survey, lay out, construct and equip, use and employ, street railroads in the city of Atlanta, subject to the approval of the City Council thereof for each route selected, first had and obtained, before the work thereon shall be commenced, for and

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during the limitation of their respective charters, subject to the right reserved by the State to withdraw, modify or restrict the respective franchises granted to each company, as provided by the general law of the State at the time of the acceptance thereof by each company.

Let the judgment of the Court below granting the injunction be reversed.

M. J. AND J. J. HUSSEY, administrators, plaintiffs in error,
vs. JOHN NEAL *et al.*, defendants in error.

1. The defendants cannot by cross-bill claim damages from the complainant who resides in a different county, alleged to have been sustained by the wrongful suing out of the writ of injunction in said case. (R.)
2. Under the facts of this case there was equity in the cross bill of the defendants, and the Court did not err in refusing to sustain the demurrer to the same. (R.)

Equity. Damages. Venue. Before Judge KIDDOO.
Mitchell Superior Court. May Term, 1873.

On the 2d November, 1860, Cochran sold a plantation to Grier, giving bond for titles and taking two notes from Grier, each for \$10,625 00, one due January 1, 1861, the other January 1, 1862. Cochran owed Andrews about \$3,500 00 unpaid purchase money for the land, and only had Andrews' bond for titles. There were judgments for a considerable amount against Cochran when he sold to Grier. In December, 1861, Cochran bought a plantation from Slaughter, and gave therefor the two notes on Grier, indorsing them, and took Slaughter's bond for titles. Cochran also bought personal property to the amount of \$2,400 00 from Slaughter, and gave his note for that amount. Slaughter owed Culpepper (his vendor) two notes of \$8,750 00 each, one due January 1, 1863, the other January 1, 1864, to secure which Slaughter had given Culpepper a mortgage on the land sold

to Cochran. In May, 1863, Slaughter died, and in November, the same year, Cochran died, the above mortgage note judgments being unpaid. Neal, a judgment creditor of Cochran, filed a creditor's bill against the administrator *de bonis non*, etc., of Cochran, making the administratrix of Slaughter a party and enjoining her from collecting only a certain portion of the notes on Grier. Also making Grier a party and enjoining him from paying the notes, and asking the appointment of a receiver. Various creditors of Cochran came in and were made parties. Grier also obtained an injunction restraining a suit instituted by Mrs. Slaughter on the notes against him.

At the November term, 1867, of Mitchell Superior Court, by consent of all parties, an interlocutory decree was taken, directing that receivers be appointed; that Mrs. Slaughter, (now Mrs. Hussey,) administratrix of Slaughter, deliver the notes on Grier to the receiver; that out of the proceeds of the notes the receiver pay the Andrews debt which was in judgment; that Grier should have clear titles to the Andrews' land; that Mrs. Slaughter be subrogated to all the rights of Andrews under his judgment in the final distribution of the assets of Cochran's estate. A decree was taken at the same time in favor of the receiver against Grier on his notes for about \$30,000 00. The object of this arrangement was to obtain money to discharge the mortgage on the plantation bought by Cochran from Slaughter, so that it might be secured unencumbered to the estate of Cochran and his creditors.

Grier having failed to pay the decree against him, and proving insolvent, it was, by consent of parties, agreed that another interlocutory decree should be taken at May term, 1869, whereby Grier was to surrender the Andrews' land to the receiver, together with certain rent notes for the plantation for 1868 for about \$4,000 00, receive his own notes and be discharged.

In the meantime, the mortgage creditors of Slaughter had foreclosed the mortgage and sold the Culpepper-Slaughter plantation in December, 1868, for about \$9,500 00, leaving

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about \$10,000 00 of the mortgage debt unpaid, and due by Slaughter's estate.

The receivers sold the Andrews land for about \$10,000 00, and collected the rent, about \$4,000 00. There was personal property to the amount of several thousand dollars, belonging to the Cochran estate, which was in the hands of the receivers.

Mrs. Slaughter having intermarried with J. J. Hussey, who joined her in the administration, they filed an answer to the bill of Neal in the nature of a cross-bill, denying the rights of the creditors to the funds in the hands of the receiver—setting up the claim of the Slaughter estate to the same—so far as it came from the Andrews' plantation, by virtue of the foregoing facts, and asking a decree therefor, and alleging that the estate had been damaged by the injunction against it to the amount of \$30,000 00, and also for a decree against Neal, who resides in Fulton county, and those who had made themselves complainants with him, for the amount of such damages. Both the Slaughter and Cochran estates are insolvent. Neal filed a demurrer, that the Court had no jurisdiction to grant the relief prayed for as to him; and jointly with the other defendants, that there was no equity in the cross-bill. The Court sustained the demurrer so far only as the cross-bill relates to and prays damages against Neal, and overruled it as to the other ground. Both parties excepted, and a joint bill of exceptions is brought to this Court.

WRIGHT & WARREN; HINES & HOBBS, for plaintiffs in error.

1st. Did the Superior Court of Mitchell county have jurisdiction to hear the question of damages as against John Neal? *Penn vs. Lord Balt.*, 1 Vesey; Code, secs. 3417, 3084, 3023; 39 Ga. R., 533; 27 *Ibid.*, 178; 44 *Ibid.*, 65; 35 *Ibid.*, 208; 23 *Ibid.*, 139.

2d. Is there any equity in the cross-bill of Slaughter's administrators? 35 Ga. R., 119; *Kendall vs. Dow*, 46 *Ibid.*, 607.

LYON & IRVIN; VASON & DAVIS, for defendants.

TRIPPE, Judge.

We know of no statute or practice in this State which allows a defendant in a bill for injunction, etc., to set up in his answer, by way of cross-bill, a claim for damages against the complainant for suing out the injunction. The statutes of some of the States expressly secure this right to the defendant, and in some of them it is provided that the Chancellor may, on a dissolution of the injunction, decree damages to the defendant. But we have no such provision in the Code, nor are we aware of any practice allowing it in this State. When this injunction was granted, it was under that section of the Code which gave the Judge power to grant such writs, "upon such terms as to the affidavit and giving bond and security, as the Judge may direct:" Revised Code, sec. 3150. Section 3045 is: "Generally, equity jurisprudence embraces the same matters of jurisdiction and modes of remedy in Georgia as was allowed and practiced in England:" See *Bein et al. vs. Heath*, 12 Howard, 168. We, consequently, affirm the judgment of the Court below in sustaining the demurrer to that portion of the answer filed as a cross-bill, which prays that damages may be decreed for suing out the injunction.

We also affirm the judgment in overruling the demurrer to the cross-bill, for want of equity. Cochran bought Slaughter's land in December, 1861, and went into possession. He, and his representative after his death, and the receiver, after this litigation commenced, were in possession of that plantation until December, 1868. The receiver also has received several thousand dollars from the rent of the Andrews-Grier plantation. By the first consent decree, the administratrix of Slaughter turned over to the receiver the notes she held on Grier, and judgment was at the same time taken in favor of the receiver on these notes for about \$30,000 00. The purpose of this arrangement having failed, another interlocutory decree was taken by consent, whereby the Grier debt was canceled, and the Andrews land and some \$4,000 00 for rent thereof for 1868, were surrendered by Grier to the receiver,

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and the land sold by him. My own mind is quite strongly impressed that the estate of Slaughter has an equity in this fund, so far as concerns the increase thereof caused by the rent. It was by the giving up the notes held by the administratrix on Grier into the hands of the receiver that the whole fund was brought into Court. And it would seem to be not altogether equitable that Cochran and his representative and the receiver should have the benefit of six years' use of the Slaughter plantation, five of the six years being after Cochran's death, and by presumption of law, that much for the benefit of creditors; and, also, the receiver to get \$4,000 00 for the rent of the Andrews place, and then that the whole fund arising from all these sources, including the sale of the Andrews land, should be appropriated to Cochran's creditors, to the exclusion of Slaughter's estate.

Moreover, the claim of Cochran, or his representative, on Slaughter, for a breach of Slaughter's bond, would be the value of the land at the time of the breach. What that value was, was not shown. It is true the sale was in December, 1868, but that does not determine the question, especially as the claim of dower was on it. We do not decide that this would furnish a measure of the equity of the claim of the Slaughter estate on this fund—that is, by allowing that much out of the fund to the creditors, and the balance to the administratrix. We are not now prepared now so to hold, as the point was not argued. Nor do we feel prepared or authorized, upon a simple demurrer for want of equity, to adjudicate, not only that there is equity in the cross-bill, but what is the exact measure of that equity. We simply affirm the judgment overruling the demurrer on this point.

Judgment affirmed.

JOHN DOE, *ex dem.*, THOMAS M. TURNER *et al.*, plaintiffs in error, vs. RICHARD ROE, casual ejector, and THOMAS W. TYSON *et al.*, tenants in possession, defendants in error.

1. Where the plaintiff claimed title to land under a deed which was thirty years old, lacking three months, when the defendants' adverse possession under a deed commenced, which last deed was attacked by the plaintiff for forgery, it was error in the Court to charge the jury that "it was incumbent on the plaintiff to show that he had been in possession of the land in dispute, under the deed, or he would be driven to prove the execution of the deed as at common law, that is, he must prove by the subscribing witnesses, or one of them, the execution of the deed," as there was no adverse possession of the land inconsistent with the deed for nearly thirty years, and not then, if the title under which the defendants claimed was a forgery or fraudulent, and they had notice of it.
2. Where neither deed is recorded within the time prescribed by law, the oldest has the preference, and not the one first recorded.
3. To perfect a prescriptive title, the defendants and those under whom they claimed, must have been in possession of the land as their own, under color of written evidence of title and claim of right, for seven years next before the commencement of the plaintiff's action.
4. Where the question on trial was whether certain deeds were forgeries, and evidence of the insanity of the grantor at a certain time was admitted as tending to show that he did not execute the same, it was error in the Court to charge the jury that if the grantor was insane at the time of their execution, the deeds were void.
5. Where a deed is attacked for forgery, the admission of one of the heirs of the grantor, said heir having since died, as to its genuineness, being apparently against his interest, is competent evidence.

Ejectment. Evidence. Ancient deed. Deeds. Registry: Prescription. Charge of Court. Admissions. Before H. MORGAN, Esq., Judge *pro hac vice*. Worth Superior Court. May Term, 1873.

For the facts of this case, see the decision.

WRIGHT & WARREN; VASON & DAVIS, for plaintiff in error.

HARRIS & POPE; WILLIAM E. SMITH, for defendants.

Turner et al. vs. Tyson et al.

WARNER, Chief Justice.

This was an action of ejectment brought by the plaintiff on the several demises of *Turner et al.*, against the defendants, to recover the possession of lot of land number one hundred and eight, in the fifteenth district of Worth county. The action was commenced on the 27th March, 1858. On the trial of the case, the jury, under the charge of the Court, found a verdict for the defendants. A motion was made for a new trial on the several grounds set forth in the record, which was overruled, and the plaintiff excepted. The plaintiff offered in evidence a copy grant from the State to David Myrick to the lot of land in dispute, dated 20th April, 1823; also a deed from David Myrick to Long, dated 12th May, 1825, made in Jasper county, witnessed by Mills and Jackson, Justice of the Peace, and recorded 17th April, 1858; also a deed from Long to Davis, dated 10th July, 1839, made in Gilmer county, witnessed by Craven and Green, Justice of the Peace, and recorded 17th April, 1858; also a deed from Davis to Turner, the plaintiff's lessor, dated 3d, December, 1856, made in Fulton county, witnessed by Goodman and Bell, Notary Public, recorded 19th April, 1858. The plaintiff read in evidence, a certified copy of an order from the Inferior Court of Putnam county, appointing a guardian for the person and property of David Myrick as an insane person, dated 10th October, 1825. D. A. Vason testified that he, with Snead and other attorneys at law, were employed by Turner, who was the only party plaintiff who had any interest in said case; that the deed from David Myrick to Long, one of the links in the plaintiff's chain of title, came into his possession from Snead & Allen who were the plaintiff's attorneys; that plaintiff recognized them as his attorneys, and employed witness to aid them in the prosecution of the suit at the time it was brought, and when they turned over the deeds to him they turned over the same as the deeds of Turner. At the time the suit was brought, and in all his connection with said case, Turner treated the deeds as his property. The de-

endants, after showing that they had made search for the original title papers and being unable to find them, then offered in evidence the record book of deeds of Worth county, containing the record of a deed from David Myrick to Beard, dated 3d October, 1828, the county where it was executed not being stated, but left blank, and was signed thus, David (his \times mark) Myrick, and witnessed by Brooks and Thomas G. Bates, Justice of the Peace, recorded 3d November, 1854; also the record of a deed from Beard to Sinclair and Calhoun, executed by Johnson under a power-of-attorney dated 14th November, 1854, recorded 30th November, 1854; also a deed from Sinclair and Calhoun to Ford, dated 10th February, 1855, and recorded 17th August, 1857.

1. It appears from the evidence in the record that when Ford purchased the lot he took possession of it, in 1855; there was a woman living on the lot, Becky Wilson, who attorned to him as his tenant. Tyson was made a party defendant to the suit by order of the Court, but it does not appear that he had any paper title to the land—was in possession of it and had put substantial improvements thereon, and claimed under Ford's title. The plaintiff made an affidavit that the deed purporting to have been made by David Myrick to Beard, on the 3d of October, 1828, and witnessed by Brooks and Thomas Bates, Justice of the Peace, under which the defendants claimed, was a forgery, and the defendants also made an affidavit that the deed purporting to have been made by David Myrick to Long, in 1825, under which the plaintiff claimed, was a forgery. The plaintiff offered in evidence a certificate from the Executive Department of the State showing that no such Justice of the Peace as Bates was in commission, as such, at the date of the deed from Myrick to Beard. There is other evidence in the record going to show the time at which Myrick became insane, that he was an educated man and could write his name, etc., and that he moved from Jasper to Putnam county. The deed to the land made by Myrick to Long, on the 12th of May, 1825, was thirty years old lacking three months when Ford's adverse possession commenced, in Feb-

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ruary 1855, under color of title. If there was any possession of the land before that time by any one, they were mere squatters, and their possession was in subordination to the title of the true owner thereof, and was not *inconsistent* with Long's title derived from Myrick. The 2658 section of the Code declares, that a deed more than thirty years old, having the appearance of genuineness on inspection, and coming from the proper custody, if possession has been consistent therewith, is admissible in evidence without proof of execution.

The Court charged the jury in this case that it was incumbent on the plaintiff to show that he had been in possession of the land in dispute under the deed, or he would be driven to prove the execution of the deed, as at common law, that is, he must prove by the subscribing witnesses, or one of them, the execution of the deed. This charge of the Court, in view of the facts disclosed in the record, was error—construing this section of the Code in the light of the decision of this Court, in *McCluskey vs. Leadbetter*, 1 *Kelly's Reports*, 351, a deed thirty years old, having the appearance of genuineness on inspection, and coming from the proper custody of those claiming title under it, may be read in evidence without proof of its execution, where there is no adverse possession of the property conveyed by it *inconsistent* therewith: See, also, *Mathews vs. Castleberry*, 43 *Georgia Reports*, 346. In this case there was no adverse possession of the land inconsistent with the deed for nearly thirty years, and not then, if the title under which the defendant claimed was a forgery or fraudulent, and he had notice of it.

2. The Court also charged the jury that when there are two deeds from the same party, and both are recorded, the one first on record is (other things being equal,) the superior and better title, although the other may be the oldest deed. If you believe, then, that defendants' deed was first on record, then it will be your duty to find for defendants, should you be satisfied under the evidence that such was genuine. This charge of the Court was error, as neither the plaintiff's, or defendants' deeds from Myrick were recorded within the time

prescribed by law, and when that is the case, the oldest deed has the preference, and not the deed first recorded: *Martin vs. Williams*, 27 *Georgia Reports*, 406.

3. The Court further charged the jury, that if the defendants and those under whom they claim have been in the actual, uninterrupted, continuous possession of the land as their own, under a color of title, for seven years, the defendants' title has ripened into a title by prescription, which is good against the claimant. This charge of the Court was also error, as it did not state to the jury that the defendants, and those under whom they claimed, must have been in the possession of the land as their own, under color of *written evidence of title and claim of right*, for seven years next before the commencement of the plaintiff's action.

4. The Court also charged the jury that if they were satisfied from the testimony, that Myrick was insane on the 11th of May, 1825, or on the 3d of October, 1828, then the deeds executed by him at the respective dates thereof was void. This charge of the Court, in view of the question at issue and on trial between the parties, was error. The question at issue and on trial was not whether the deeds were void on account of Myrick's insanity, but the question was whether he ever made and executed the respective deeds, or whether the same were forgeries; and the evidence of his insanity at a stated period of time was only admissible for the purpose of illustrating or throwing light upon that question, inasmuch as an insane man would not have been as likely to have executed a deed as a sane man. Neither party sought to avoid the deeds made by Myrick on the ground of *insanity*, but attacked them on the ground that the same were *forged*.

5. The evidence of Vason as to the admissions of Robert Myrick as to the genuineness of the deed under which the plaintiff claimed, Robert being one of the heirs of David, and both being dead, was admissible in evidence, in view of the facts and circumstances of this case. If the deeds were forgeries, then the land, on the death of David, would have descended to his heirs, and it would have

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been the interest of his heirs to have established that fact rather than to have established the genuineness of the deed which passed the title out of him. It is true that the plaintiff does not claim title to the land under the heirs of David Myrick, but the question made on the trial by the affidavit of the forgery of the deed, does raise the question whether the title to the land had ever passed out of him, and the admission of one of his heirs, who is now dead, apparently against his interest, that the deed of David was genuine, was admissible in this case in support of the plaintiff's ancient deed, which was attacked on the ground of forgery after the lapse of thirty years. It was a circumstance, in view of the peculiar facts of the case, which should have been submitted to the jury for their consideration, in support of the plaintiff's ancient deed, when attacked as a forgery by the affidavit of the defendant, under the provisions of the Code.

Let the judgment of the Court below be reversed.

JOHN F. JONES, plaintiff in error, vs. JOHN T. HENDERSON,
defendant in error.

In proceedings to foreclose a mortgage on realty, the Court permitted the plaintiff to amend the pleading so as to change the time mentioned therein as to the maturity of the note set forth, from January 1st, 1869, to January 1st, 1868:

Held, That such amendment did not introduce a new cause of action, nor was the defendant, on that account, entitled to a continuance, unless he showed, as is provided in section 3470 of the Code, "that he was less prepared for trial, and how, than he would have been if such amendment had not been made."

Amendment. Continuance. Mortgage. Before Judge HARRELL. Early Superior Court. October Term, 1872.

John T. Henderson instituted proceedings against P. B. & John F. Jones to foreclose a mortgage executed by them to secure the payment of two promissory notes, each dated Feb-

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ruary 1st, 1867, for the sum of \$5,333 33, one due January 1st, 1868, and the other January 1st, 1869. The petition set forth that the note last aforesaid was unpaid, and prayed that the usual rule *nisi* might issue. The rule *nisi* was in the usual form. The defendants pleaded that they were not indebted in manner and form as charged.

The note due January 1st, 1868, was tendered in evidence; the defendants objected to its admissibility on the ground that it varied from the one set forth in the rule *nisi*. The objection was sustained.

The plaintiff then moved to amend the pleadings by inserting therein a correct description of the note tendered in evidence. The amendment was allowed over the objection of the defendants.

The defendants moved to continue, on the ground of surprise resulting from said amendment, by reason of which they were unprepared for trial. In support of this motion, they showed that the two notes set forth in said mortgage had been given for lands purchased from Henderson, which were sold as free from incumbrances; that, in fact, there was a mortgage on the same to a large amount; that Henderson was insolvent; that they desired to file the proper pleas to avail themselves of the aforesaid defense, and to procure the evidence to sustain the same. The plaintiff made a counter-showing, in which he admitted the existence of the aforesaid mortgage incumbrance, but stated that he was solvent and amply able to respond for any damages that the defendants might sustain by reason thereof.

The motion for a continuance was overruled. The jury returned a verdict for the plaintiff. The defendants excepted to the allowance of the aforesaid amendment and to the overruling of the motion for a continuance, and now assign the same as error.

Whilst the case was pending in this Court, P. B. Jones died, and it proceeded in the name of John F. Jones, as surviving partner.

Patillo vs. The State of Georgia.

T. F. JONES, by Z. D. HARRISON, for plaintiff in error.

H. & I. L. FIELDER, for defendant.

TRIPPE, Judge.

The amendment allowed by the Court was to correct the mistake in the pleadings as to the date when the note was due. This was not making or substituting a new cause of action, unless something further appeared showing it to be such. Had the amendment been the striking out one note and inserting another, and if the defendant below had made it appear that he was or had been misled by the first description of the note and the allowance of the amendment, and that "he was less prepared for trial, *and how*, than he would have been if such amendment had not been made," the right to a continuance by defendant would have been complete: Revised Code, section 3470.

The showing that was made for a continuance was on a ground which existed, and was well known to defendant, when the case was called, and applied to either and both the notes—to the one due in 1868 as well as the one due in 1869. Defendant did not show that he had been ousted of the land, or that any proceedings threatening such a result had ever been instituted. His great default was in not having taken any steps either to set up or establish any defense in the case. These facts, taken in connection with the counter-showing made by plaintiff, satisfy us that the motion to continue was properly overruled.

Judgment affirmed.

THOMAS J. PATILLO, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

1. Where the special Act establishing a County Court for the county of Dougherty made no provision as to the time within which the writ of *certiorari* to said Court should be applied for, the general County Court Act controls.

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2. Where there are two affirmative statutes, and the substance of each is such that both may stand, the latter statute does not repeal the former, but both have a concurrent efficacy.
3. Where a criminal case was tried before the County Court of Dougherty county and the defendant, upon conviction, attempted to carry the same before the Superior Court by writ of *certiorari*, but the Judge refused to sanction the petition, which refusal is assigned as error, the Solicitor General of the Albany Circuit is entitled to represent the case in this Court. (R.) See report.

County Courts. *Certiorari*. Statutes. Practice in the Supreme Court. Before Judge STROZER. Dougherty county. At Chambers, March 3d, 1873.

When this case was called the question was submitted to the Court whether the Solicitor General of the Albany Circuit or the Solicitor of the County Court of the county of Dougherty was entitled to represent the same. The case was tried before the County Court and the attempt made to carry it by *certiorari* to the Superior Court. The Judge refused to sanction the petition for *certiorari*, and petitioner excepted.

The Court held that the Solicitor General was entitled to represent the case.

For the facts, see the decision.

G. J. WRIGHT; WILLIAM OLIVER, for plaintiff in error.

B. B. BOWER, Solicitor General; VASON & DAVIS, for the State.

WARNER, Chief Justice.

The defendant was indicted in the County Court of Dougherty county for a misdemeanor; was tried and found guilty on the first Thursday in January, 1873. On the 27th day of February, 1873, he made application by petition, to the Judge of the Superior Court for a *certiorari*, which was refused, and the defendant excepted. In this case, the Judge put his refusal on the ground that the application was not made within ten days from the trial, as required by the Act of 5th of Feb-

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ruary, 1873. To this the defendant replied, that the offense was committed before the passage of the Act of 5th February, 1873, and that as the law then stood he was entitled to have three months to apply for a *certiorari*, according to the general provisions of the Code, inasmuch as the Act of 24th of August, 1872, creating the County Court for Dougherty county made no provision as to the time within which the application for a *certiorari* from that Court should be made. If there was no other Act applicable to this question but the Act of February, 1873, we should hold that the refusal of the application by the Court below was error, but there was another law of the State applicable to *certioraris* from County Courts when the alleged offense was committed and when it was tried in that Court.

The 14th section of the general County Court law provides for a *certiorari* from the decision and judgment of the county Judge, in all criminal cases, in ten days after the trial thereof. This Act was passed the 19th of January, 1872, and is applicable to *each county in the State*, except such counties as are specially named therein, and Dougherty county is not one of them. Under this last named Act, no County Judge can be appointed for a county until the grand jury thereof shall so recommend; but by the special Act for Dougherty county, passed on the 24th August, 1872, a Judge may be appointed for that County Court without the recommendation of the grand jury, but it is, nevertheless, a County Court, and the provisions of the Act of 19th January, 1872, are applicable to it, so far as the same are not repugnant to or inconsistent with the Act of 24th August, 1872. There is nothing in the special Act of 24th August, 1872, creating a County Court for Dougherty county which is repugnant to or inconsistent with the general County Court law of the 19th of January, 1872, as to the time within which application shall be made for a *certiorari* in the County Court of that county; and, therefore, the provisions of that general law are as applicable to the County Court of Dougherty county as to any other County Court in the State, so far as the time of making an applica-

tion for *certiorari* is concerned. Both Acts provide for a County Court—the one by a special Act, the other by a general law of the State—and both are affirmative statutes, and the rule is that where there are two affirmative statutes, and the substance of each is such that both may stand together, then the later statute does not repeal the former, but both shall have a concurrent efficacy. There is nothing in the special Act of 24th of August, 1872, creating a County Court for the county of Dougherty which is repugnant to or inconsistent with the general law of the State providing for *certioraris* to the Superior Courts in criminal cases tried in the County Courts, and that general law of the 19th of January, 1872, was as applicable to the obtaining a *certiorari* from the County Court of Dougherty, as any other County Court, provided the application was made therefor within ten days, as prescribed by that general law of the State. This general law of the State being of force at the time the offense is alleged to have been committed and the trial had, the application for a *certiorari* should have been made to the presiding Judge in ten days after the trial, as prescribed by the 14th section of the Act of 19th January, 1872, and as the defendant did not do so, the application for a *certiorari* was properly refused for that reason, and the judgment of the Court below should be affirmed.

Judgment affirmed.

WILLIAM WILLIAMS *et al.*, executors, plaintiffs in error, vs.
LITTLETON PHIPPS, defendant in error.

Though the statement of an obligee in a bond for titles, made to his assignee at the time of its transfer, to the effect that the purchase money was payable in Confederate currency, is not admissible as evidence against the obligor, yet if there be other testimony sufficient to authorize the jury to scale the claim under the Ordinance of 1865, and they do so scale it, this Court is not bound to grant a new trial, especially if substantial justice appears to have been done.

Williams et al. vs. Phipps.

Scaling Ordinance. Bond for titles. Evidence. Before Judge STROZER. Baker Superior Court. May Term, 1873.

William D. Williams brought ejectment against Littleton Phipps for the recovery of lot number one hundred and twenty-eight, in the eighth district of Baker county. Phipps filed his bill to enjoin said action. He alleged that on April 23d, 1862, one John G. Slappy purchased said land from Williams and took the following bond for titles:

"GEORGIA—BAKER COUNTY.

"I hereby pledge my word to Dr. John G. Slappy to make him good and sufficient titles to lot of land number one hundred and twenty-eight, in the eighth district of said county, provided he pay me \$1,250 00, with interest from the 1st day of *(December, 1858, by the first day of) January next, or one-half of that amount and the remaining half twelve months thereafter. Titles not to be made until the whole amount is paid. I am to have possession of said land if the first payment is not made as above specified.

"April 23d, 1862. (Signed) W. D. WILLIAMS."

That on January 1st, 1863, the time of payment specified in said writing obligatory, Slappy paid to said Williams \$803 25, the first installment due, and on the succeeding day transferred said instrument to complainant for a valuable consideration; that the understanding between Williams and Slappy, at the time of the making of the aforesaid contract was, that the purchase money for said land should be paid in Confederate money, or other like depreciated currency, which, on the day the first installment became due, was only worth one-third its nominal value, and on January 1st, 1864, when the second installment matured, was worth but one-tenth its nominal value; that at the time complainant purchased, it was the distinct understanding between him and Slappy that he was to pay the balance of the purchase money

*The words within brackets do not appear in the instrument as set forth in the brief of evidence.

due to Williams in said depreciated currency, and complainant accordingly, on the day the second installment matured, tendered to Williams the full amount thereof in Confederate money, which he refused to accept; that on September 27th, 1866, complainant paid to said Williams \$300 00 in United States currency, and on July 29th, 1868, \$150 00 in the same currency, on account of said land.

Prayer that the action of ejectment be enjoined, and that the defendant be decreed to perform specifically his contract aforesaid, and to execute to complainant a valid title to said land.

The answer of the defendant is unnecessary to an understanding of the decision, and is, therefore, omitted.

The evidence of the complainant sustained substantially the allegations of the bill. During his examination his counsel proposed to ask him the following question :

“What was your understanding as to the kind of money which Slappy was to pay defendant for the land?”

Counsel for defendant objected to the complainant's stating his understanding unless he derived his information from the defendant. The objection was overruled, and the complainant testified that his understanding, as derived from Slappy, was that the purchase money was to be paid in Confederate currency.

The jury returned a verdict directing that upon the payment of \$175 00 within thirty days to the defendant, he should convey the premises in dispute, by deed, to the complainant.

The defendant moved for a new trial upon several grounds, and amongst them, because the Court erred in overruling the objection aforesaid to the complainant's testimony as to his understanding in reference to the currency in which payment for the premises in dispute was to be made.

The motion was overruled and the defendant excepted.

The plaintiff in error having died whilst the case was pending in this Court, his executors, William Williams and Howell Williams, were, by consent, made parties in his place.

Williams et al. vs. Phipps.

A. L. HAWES; VASON & DAVIS, for plaintiff in error.

I. C. BOWER; GURLEY & RUSSELL, for the defendant.

TRIPPE, Judge.

It was improper to admit in evidence any statement made by Slappy, the obligee in the bond to his assignee, when the obligor was not present, and in this case, the error would be sufficient to order a new trial, did it not appear that there was sufficient evidence, without that to authorize the jury to scale this claim as they have done. That evidence was in writing, and was an entry on the bond made by the obligor himself. This bond bore date, April 23d, 1862. This entry was dated January 1st, 1863, and recited that the obligor had that day received one-half the amount to be paid from Slappy in Confederate money, and if Slappy paid the other half in twelve months he was to make him titles, otherwise he was to refund what was paid in Confederate notes or its equivalent. The next day Slappy transferred the bond to Phipps, with that entry on it. Phipps tendered, at the proper time, the balance in Confederate money, which was refused. Since the war Phipps paid Williams several hundred dollars in United States currency. The jury gave a verdict for \$175 00, in favor of plaintiff.

Although the Court may have committed the error referred to, yet, the jury well may have given the verdict under the other evidence, and as we think substantial justice was done, we do not grant a new trial on that account.

Judgment affirmed.

MAYOR AND COUNCIL OF THE CITY OF CUTHBERT, plaintiff in error, *vs.* **JAMES M. BROOKS *et al.***, defendants in error.

1. This Court will presume that the Court below had good and sufficient grounds for the postponement of the hearing of the motion for the new trial as it did, in the absence of any showing to the contrary, and that the defendant's counsel was not in default in not filing the brief of the evidence within the fifteen days after its approval and order to file it by the Court.
2. This Court has no lawful power or authority to control the discretion of the Superior Courts in the legitimate exercise of their discretion in conducting the business before them, unless that discretion has been abused, or some law of the land violated.
3. Where the clerk and treasurer of the city of Cuthbert was elected for the year 1867, and gave bond for the faithful performance of his duties "for the present year," but at the expiration of said year held over during the next until he was suspended, no successor having been appointed, it was not error in the Court to charge, upon the trial of an action brought on said bond, that said treasurer and his securities were liable for all moneys that came into his hands, as such treasurer, until his successor was appointed.
4. Where the accounts which are the subject of a judicial investigation are complicated, the Court should appoint an auditor, to whom the matters in controversy should be referred.

New trial. Discretion. Bond. Municipal corporation.

- Auditor. Before Judge HARRELL. Randolph Superior Court. November Term, 1872.

The Mayor and Council of the city of Cuthbert brought complaint against James M. Brooks, as principal, and Zadock C. Hood *et al.*, securities, for the sum of \$2,000 00, alleged to be due upon the following bond:

"GEORGIA—CITY OF CUTHBERT:

"Know all men by these presents, that we, J. M. Brooks, as principal, and Z. C. Hood, E. L. Douglass, Thomas Coleman and Jacob Mein, as securities, are held and bound unto the present City Council of said city, in the sum of \$2,000 00, for which we bind our heirs and assigns, jointly and severally; to be void on condition that the said J. M. Brooks shall do

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and perform all the duties of clerk and treasurer of said city for the present year, as the city law requires him, otherwise to remain in force.

“Witness our hands and seals, February 4th, 1867.

(Signed)	“J. M. BROOKS,	[L. s.]
	“Z. C. HOOD,	[L. s.]
	“E. L. DOUGLASS,	[L. s.]
	“THOMAS COLEMAN,	[L. s.]
	“JACOB MEIN.	[L. s.]

“Approved:

“WILLIAM D. KIDDOO, Mayor,

“WINFIELD SCOTT,

“R. D. CHAPMAN,

“L. A. SMITH.”

A count was also added to the effect that said Brooks, as clerk and treasurer, during the year 1867, and up to the time his successor was installed in office, collected \$4,000 00, for which he has never accounted.

The defendant, Brooks, pleaded the general issue. No plea was filed by the other defendants.

The following evidence was introduced:

William D. Kiddoo, sworn: Was elected Mayor the first of 1867, and held the office in 1867 and 1868; there was no election for Mayor and Council in 1868; they held over; about the middle of January, 1868, Brooks, who was clerk and treasurer, made his annual report; witness and Mr. Winfield Scott were appointed to examine the report; the committee was satisfied the report was incorrect, and made out the statement attached to the declaration as an exhibit of charges and credits; that showed an indebtedness of \$497 10; since then, he ascertained other items; Shaw's license was returned as \$10 00, when it should have been \$50 00; it appeared by his vouchers that he charged commissions on a greater amount of street exemptions than the committee charged him with; the amount charged was \$770 00, and the amount he charged commissions upon was larger; when the committee reported to Council,

Brooks was present; on the 25th January, 1868, Brooks was suspended from office and a time appointed for investigation; at that time many items charged in the exhibit were gone over with Brooks, and he was requested to make objections to any that were wrong, the books that have been put in evidence being present and examined, and he did not deny any of the items; admitted all the collections charged, except he did not collect \$50 00 from Nick Geeslin for retail license; admitted he issued the license, but said the marshal was to pay him, but had not done so; the items charged for taxes, to-wit: \$88 40, for 1866, appear by Brooks' books, kept by him, to have been collected during the first quarter of 1867; for taxes, to-wit: \$134 34, for 1866, appear by same books were collected in second quarter, 1867; the amount of \$18 23, of 1866 taxes, he admitted collected in 1867; the balance of \$66 00 from 1866 was published in his report for first quarter in 1867; the paper is burnt; the taxes for 1867, as set forth in exhibit, appear on the tax books of 1867, marked paid, in Brooks' handwriting, except two items which he admitted, and one dollar of Samuel Clayton, which witness paid him. All the street exemptions or taxes appear on the book kept by him as paid; the fines all appear on the docket; some of the license appear to have been paid, and some do not; all of these he admitted, as before stated, were paid except the Geeslin license. In 1868, and between the time of his report and the committee's report, Brooks collected the sum of \$565 00 for license of 1868, and when he was suspended, he paid that sum, which he had in a bundle to itself, to W. Scott, temporary treasurer; he also, at same time, paid the sum of \$229 40, as appears in report; the items that appear upon Brooks' books as collected in 1868, in January, he cannot state when they were collected, but supposes at the dates as appear on his books.

Winfield Scott, sworn: Was elected Councilman for 1867; Mayor and Council held over for 1868 without re-election, in the early part of the year 1868; the Mayor and witness was appointed to examine the accounts of James M. Brooks, the clerk and treasurer, who was elected in 1867, and upon ex-

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amination of Brooks' account, we found him indebted to the city in the sum of \$497 10. When the report to this effect was submitted to the Council, together with the books, Brooks promised to pay the amount due.

The report of the committee was read, showing balance due the plaintiff of \$497 10.

West Harris testified substantially as did Winfield Scott.

The bond sued on was read, and the plaintiff closed.

The defendant, Brooks, testified as follows: He was not indebted to the City Council of Cuthbert for 1867 upon a fair allowance of his vouchers and claims against said city; he has no recollection of admitting that he was owing said city in 1868, when the committee, Messrs. Kiddoo and Scott, made their report that he was indebted to said city in the sum of \$497 10, but does deny that he owed the sum; he left a part of his vouchers with the Mayor and Council, but has never been able to get them until to-day; that William D. Kiddoo made his return quarterly, and that the return made on the 30th of September, 1867, was made out by Kiddoo. That brought him in debt up to that date \$479 10. This return was lost during the trial. The Mayor and Council received his return, as appears from the minutes of said corporation, on October 1st, 1871. There were three fines on the list attached to the declaration which he did not get, to-wit: Thomas C. Byars, \$10 00; Joe Winter, \$10 00; Herbert Fielder,

William D. Kiddoo, recalled for the plaintiff, testified as follows: He did make out the return of Brooks, as appears on 31st of September, 1867, but did so, as he thinks, from another return which witness has in his hands in handwriting of Brooks, and supposes the one in witness' handwriting was an abstract of the other, made out for publication. He did not take charge and control of Brooks' books for 1867, nor did he examine into that return nor any other he ever made, except the one he made in January, 1868. Nor was he ever appointed on a committee for that purpose until that one.

The fine against Thomas C. Byars that Brooks testifies was

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not paid to him, appears in his handwriting, to have been paid to him, together with three other fines against same party. As to the fines against Herbert Fielder, which Brooks testifies was never paid to him, Fielder never was fined to his knowledge. Has not examined the one against Winter sufficiently to state whether it was paid, but it was there when the list was made.

The jury, under the charge of the Court, found for the plaintiff \$537 10, with interest from January 28th, 1868.

The remaining facts are fully reported in the decision.

A. HOOD, for plaintiff in error.

E. L. DOUGLASS; WORRILL & CHASTAIN, for defendants.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendant and his securities on a bond given by him as clerk and treasurer of the city of Cuthbert. On the trial of the case, the jury found a verdict for the plaintiff for the sum of \$537 10. A motion was made for a new trial on the several grounds stated therein, which was granted by the Court, and the plaintiff excepted. The plaintiff also made a motion to dismiss the motion for a new trial when it came on to be heard, on the ground that time had been given for filing a brief of the evidence by the Court, and that the hearing of the motion had been postponed by the order of the Court from time to time, until November term, 1872, the case having been tried at the November term of the Court, 1871, and because the brief of the evidence was not filed within the time ordered by the Court after its approval of the same, though it was filed before the hearing of the motion. The Court overruled the motion to dismiss the rule for a new trial, and the plaintiff excepted.

1. This Court will presume that the Court below had good and sufficient grounds for the postponement of the hearing of the motion as it did, in the absence of any showing to the contrary, and that the defendant's counsel was not in default, in

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not filing the brief of the evidence within the fifteen days after its approval and order to file it by the Court. The presiding Judge may not have returned it in time to have been filed within the fifteen days, and it is not apparent that the plaintiff was hurt in any manner by its not having been filed within that time.

2. There is a general disposition manifested by parties and counsel to *ignore* all discretion on the part of the Superior Courts and the Judges thereof, in conducting the business before them, and to consider this Court as a Court of original jurisdiction for that purpose; whereas, the Constitution and laws of the State have clothed the Superior Courts and the Judges thereof with original jurisdiction and discretion to hear and determine cases which may be brought before them as provided by law, and this Court has no lawful power or authority to control the exercise of the discretion of the Superior Courts or the Judges thereof, in the legitimate exercise of their discretion in conducting the business before them, unless that discretion has been abused, or some law of the land violated.

3. There was no error in the charge of the Court to the jury, in view of the facts contained in the record, that the defendant, Brooks, as treasurer, and his securities were liable for all moneys that came into his hands as such treasurer, until his successor was appointed according to law. In looking through the evidence in the record, we are not entirely satisfied that the verdict was right, and for that reason, we will not control the exercise of the discretion of the Court below in granting the new trial.

4. In our judgment, this is a case in which the Court below might properly exercise its discretion in the appointment of an auditor to investigate the treasurer's accounts with the city authorities, and report the result thereof to the Court, as provided by the Act of 13th December, 1871.

Let the judgment of the Court below be affirmed.

CORTNEY CROCKETT, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

The circumstances connected with the perpetration of the offense charged, as testified to by the victim of the rape—the degree of resistance on her part—the fact that no alarm or outcry was made, the place being where it could have been easily heard—no marks of violence having been exhibited, and the injury being concealed for several days after the opportunity of making complaint, and no proof of any complaint ever having been made except by the party said to be injured, together with the fact that no legal step was taken to punish the outrage until pregnancy was discovered, make this a case where the crime charged was not sufficiently proven under the law to justify a verdict of guilty.

Criminal law. Rape. New trial. Before Judge HOPKINS. DeKalb Superior Court. March Term, 1873.

Cortney Crockett was placed on trial for the offense of rape, alleged to have been committed upon the person of one Ella Johnson, on December 18th, 1872. The defendant pleaded not guilty.

Ella Johnson testified substantially as follows: Witness is nearly eighteen years old; has never married; about three or four weeks before Christmas, her mother sent her to defendant's house with a dime, which she was to give to his wife to get some potash from town for her; she was also up there getting up wood for washing; witness' house is about two hundred yards from defendant's. When defendant's wife went to town, witness came out of the house and turned to go home; did not stay there ten minutes after his wife left; when witness got outside of the fence, on the side of the road, defendant came up to her, caught her by the hand, and put his arm around her waist; told him to turn her loose; he said he was going to do it any how, and stooped down; "he just done what he wanted to do;" he asked witness to "let him do it;" told him he should not; tried to push him off but could not do it; he was too strong for her; he had connection with her; did not consent to his having intercourse with her; witness cried and told him to let her loose; it looked like

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the more she talked the worse he got; after he got through he went on up town and she went home and commenced her washing; did not tell her father at once about it, as it was such a "mean act, and she hated to;" he never raped her before or after; it hurt her a little, not very much; it happened about two hundred yards from defendant's house; there was nobody at his house in the morning but his wife and his mother-in-law; they went to town; the occurrence took place about nine o'clock in the morning; the road is not a public road; it is a settlement road, leading to a mill; her father was away working on his house; her mother did not come home until night; did not tell her; it was Wednesday that the defendant had intercourse with her; did not tell any one until the following Sunday, when she informed her sister-in-law, Letty; Letty told witness' father, and then he asked her about it and she told him; that was after January 1st, 1873; the mill to which the road led was running every day; people were constantly passing along it; she did not halloo loud; did not fight him; just tried to push him off; he had her hands pushed back under his arms so she could not get them out; Mrs. White's house is beyond witness' house; she has two boys big enough to plough; does not know if they were at home; they are frequently about there; defendant knew the boys were there; he was not arrested until yesterday; she "let it go along till Court came up;" is now in the family way by the defendant; they had found this out before witness told her father about defendant's conduct; if his wife and mother-in-law had looked round as they went off, they could have seen defendant and witness; she did not tell her father and mother about it sooner, as she hated to let them know what had been done; told her sister-in-law before it was known that she was pregnant; all of this happened in DeKalb county during last December.

Benjamin Johnson testified as follows: I am father of Ella Johnson; I first heard of the rape about two weeks after I moved to the Brown place; my daughter-in-law told me about it; I went to Esquire Tuggle to get him arrested; he

told me to hold on till Court met and see the Solicitor General; I did so, by his advice; I think my daughter is pregnant; Ella has been with me since the surrender all the time; she has been a good, virtuous girl; she did not talk to me about being in the family way in the field at Brown's; I mentioned it to her in my house; it was not mentioned in the field; when it was mentioned in the house, her mother and the children were present; we did not know she was in the family way then; I went to Tuggle's to get a warrant some time after I had moved to the Brown place; moved there since Christmas; I suspected she was in the family way from her actions and not eating, etc.; I kept that to myself; I told wife after daughter-in-law told me; I went to Ella and she said defendant done it; I then went to Tuggle to get a warrant and he would not give me one; I came here on Tuesday and told the Solicitor General about it; I was informed of the rape *two* weeks after it occurred.

The defendant made the following statement: "Well, the way it was done was this. My wife and mother started to town. I staid at the house, after they started off to town. The girl came with fifteen cents for my wife to get potash for her mother, and also tubs to take to the spring. I went and carried the tubs to the spring and went back to the house. When I got back to the house my wife had started and got about one hundred yards from the house. The girl came into the house where I was. I said, 'Ella, don't you want a dram?' She said 'yes,' I said, 'come and get it,' which she did. I then said, 'Ella, won't you give me some?' She said, 'I will if you won't tell anybody.' I said, 'I won't if you won't.' They owed me twenty cents. I went to Atlanta and bought her ten cents worth of snuff and give it to her. That is the truth, just exactly the way it was."

The jury found the defendant guilty. A motion was made for a new trial because the verdict was contrary to the law and the evidence. The motion was overruled and the defendant excepted.

HILL & CANDLER; L. J. WINN, for plaintiff in error.

JOHN T. GLENN, Solicitor General, for the State.

TRIPPE, Judge.

No words more pregnant with judicial wisdom or more appropriately uttered, were ever pronounced by a Judge than those of that great and good man, Lord HALE, when he said, "It must be remembered that rape is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent." He, then, after mentioning two remarkable cases of malicious prosecution for this crime which came within his own knowledge, adds, "I mention these instances that we may be the more cautious upon the trial of offenses of this nature, wherein the Court and jury may, with so much ease, be imposed upon without great care and vigilance, the heinousness of the offense many times transporting the Judge and jury with so much indignation, that they are over-hastily carried to the conviction of the person accused thereof, by the confident testimony, sometimes, of malicious and false witnesses:" 1 Hale, 635, 636.

The following rules and principles are of great worth and significance, and should not be forgotten in the trial of such cases. They are to be found in all the elementary works on criminal law, and if they are thoroughly understood and applied, would go far to protect juries from imposition and innocent parties from being made victims to the revenge of a witness, or to an attempt to protect reputation, lost by consent, under the cry of rape. "Though the party ravished is a competent witness, the credibility of her testimony must be left to the jury, upon the circumstances of fact *which concur with that testimony*. Thus, if she be of good fame—if she presently discovered the offense and made search for the offender—if she showed circumstances and signs of the injury, whereof many are of that nature that women only are proper examiners—if the place where the act was done were remote from

inhabitants or passengers—if the party accused fled for it—these, and the like, are concurring circumstances which give greater probability to her evidence. But if, on the other hand, the witness be of evil fame, and stand unsupported by others—if, without being under control or the influence of fear, she concealed the injury for any considerable time after she had the opportunity of complaining—if the place where the act is alleged to have been committed was near to persons by whom she might probably have been heard, and yet she made no outcry—if she has given wrong descriptions of the place—these and the like circumstances afford a strong, though not conclusive presumption that her testimony is feigned.” 4 Black. Com., 213, 214; 1 East. P. C., 445, 446; 1 Russ. on Crimes, 688, 689, and criminal law *passim*.

Apply these principles to this case and there is not one single particular in which the testimony comes up to them. True, the witness was not proven to be of ill fame, nor did it appear she had given wrong descriptions of the place. But it does appear that the act was done, if not in a public place, near to a neighborhood road—just outside of it—which was continually being traveled; that the wife and mother-in-law of the accused had just walked off—were still in sight—and could have seen them had they “looked round;” that she did not “halloo loud;” that she got up, finished getting wood and went to washing near by defendant’s house; did not tell anybody but her sister-in-law, the next Sunday, four days afterwards, and that proven by nobody but herself; that the sister-in-law seems to have been so little impressed by it that she did not tell the father or any one else until after the pregnancy was discovered; that it was the first time she ever had connection with a man; that she was, by this first act, committed by violence and over her resistance, begotten with child, and never said one word about it which was properly proven, until after she was known to be pregnant. This dereliction from the rule quoted is too great on the part of the prosecution to allow the verdict to stand. Had any reasonable explanation been given why such facts were not proven, or why

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they did not occur, it would have been entitled to consideration. There is none such in the record.

Judgment reversed and a new trial granted.

CHARLES F. CRISP, Solicitor General, *ex rel.*, ANDREW J. WILLIAMS, plaintiff in error, vs. GEORGE A. BROWN, respondent, defendant in error.

It was competent for the General Assembly, after the year 1868, to provide for the election and succession of the county officers of the State, as was done under the 3d section of the Act of 1872, and an Ordinary elected under this law and commissioned by the Governor, will not be ejected upon the relation of one claiming to have been elected under the provisions of the 1346th section of the Code.

Quo warranto. Election. Officers. Ordinary. Before Judge CLARKE. Sumter County. At Chambers. January 25th, 1873.

For the facts of this case, see the decision.

W. A. HAWKINS, for plaintiff in error.

N. A. SMITH; W. B. GUERRY, for defendant.

WARNER, Chief Justice.

The relator in this case claims that he was duly elected Ordinary of Sumter county on the first Wednesday of January, 1872, under the provisions of the 1346th section of the Revised Code. On the hearing of the application for a *quo warranto* it was refused, and the relator excepted. It appears from the record that the respondent, Brown, who is now exercising the duties and functions of the office of Ordinary of Sumter county under a commission from the Governor of the State, was first elected in the year 1872, to fill a vacancy which occurred in the office, according to law, and was duly commissioned by the Governor to fill such vacancy for the

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unexpired term, and continued to hold said office until he was again elected in January, 1873, and duly commissioned by the Governor, and the question is, who is the legal Ordinary of Sumter county—the relator, who was elected in 1872, but not commissioned by the Governor, or the respondent who was elected in January, 1873, under the provisions of the Act of 20th August, 1872? Who has the legal right and title to the office under the Constitution and laws of the State? On the 10th of March, 1868, an ordinance was adopted by the Convention, which provided for the continuance in office of the civil officers of the State until the regular succession provided for *after* the year 1868, and until successors are elected and qualified. By the twelfth section of the eleventh article of the Constitution of 1868, this ordinance had the force of law until its provisions expired by their own limitation, or until otherwise provided by the General Assembly. It was competent, therefore, for the General Assembly, *after* the year 1868, to provide for the election and succession of county officers of the State, as was done by the 3d section of the Act of 1872, and the respondent having been elected and commissioned by the Governor under the provisions of this last named Act, he is entitled to hold and exercise the duties and functions of the office of Ordinary of Sumter County.

Let the judgment of the Court below be affirmed.

BOAZ KITCHENS, trustee, plaintiff in error, *vs.* **RICHARD H. HUTCHINS**, defendant in error.

There was sufficient evidence in this case, showing that the value of the land levied on was greater than the amount due on the execution, to authorize the damages to be assessed on said amount.

Claim. Damages. Before Judge CLARKE. Sumter Superior Court. April Term, 1873.

An execution in favor of Richard H. Hutchins against Boaz Kitchens and John S. Humphries, for the sum of \$1,311 13,

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besides interest and costs, based upon a judgment rendered at the October term, 1871, of Sumter Superior Court, was levied upon eight hundred acres of land in the county of Sumter, as the property of Kitchens. The land was claimed by said Kitchens as trustee for his wife and five minor children. When the issue thus formed was called for trial, the claim was withdrawn. The Court then permitted the plaintiff in execution to proceed before the jury for the purpose of claiming damages.

The execution, levy, claim, and two notes by said Kitchens and Humphreys, payable to Hutchins, as guardian for Emily A. and Eliza D. Hutchins, or bearer, one for \$500 00, and the other for \$811 13, dated April 20th, 1863, and due on January 1st next thereafter, were introduced in evidence.

*The plaintiff testified that the above notes were given in part of the purchase money of five hundred acres of land, which was then levied on; that he sold Kitchens the land, but did not know that he held the same in trust for his wife and children until recently; that the numbers of the lots of land on the plat annexed to the homestead papers are the same as he sold to Kitchens; that he had come from Macon twice in attending to this case at a cost of \$25 00, and had lost five or six days; that money is worth two per cent. per month, and his time was worth to him \$5 00 per day.

C. T. Goode, an attorney, testified that \$200 00 would be a reasonable charge for attorney's fees in the case.

The claimant introduced the proceedings by which he had had set apart to him as a homestead, the land claimed, on December 23d, 1868.

The Court charged the jury, "that if they found that the claim was interposed for delay only, the claimant having withdrawn his claim, it was their duty to find for the plaintiff in *fi. fa.* such damages as were reasonable and just under the

*The levy is upon eight hundred acres of land, whilst the plaintiff in *f. fa.* states that the sale was of five hundred. This discrepancy is in strict accord with the record. It is supposed that the levy embraced land not sold by plaintiff in *f. fa.* (R.)

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proof; that if they should find any damages, they should assess the same on the principal sum of said *fi. fa.*

The jury returned a verdict for the plaintiff of twenty per cent. on the principal sum of the execution. The claimant moved for a new trial on the ground of error in the above charge. The motion was overruled, and the claimant excepted.

JOHN R. WORRILL, for plaintiff in error.

LYON & IRVIN; HAWKINS & HAWKINS; N. A. SMITH, for defendant.

TRIPPE, Judge.

The Court charged the jury, "that if they found that the claim was interposed for delay only, it was their duty to find for the plaintiff such damages as were reasonable and just, under the proof; that, if they should find any damages, they should assess the same on the principal sum of the *fi. fa.*"

Exception is taken to this charge, because plaintiff in error alleges that there was no evidence showing that the value of the land exceeded the amount due on the *fi. fa.*, according to section 3742, new Code. It will be observed that the charge of the Court did not limit the jury so that they should not assess the damages at less than ten per cent. But the claimant cannot complain of that, as it could have done him no injury. The Court also said nothing as to the necessity of the proof showing that the value of the land was greater than the amount of the execution, as specified in the Code, where damages are to be assessed according to said amount. The exception is not to this omission in the charge, and, under the facts proven, it was an immaterial omission, for if the proof was sufficient that the value of the land was greater than the principal of the *fi. fa.*, and the jury assessed the damages on that principal, claimant has no right to complain on that point. The objection is, that the value of the land was not proven, so as to authorize the assessment to be made on the

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principal of the *fi. fa.* The levy was on eight hundred acres. Plaintiff testified that in 1863 the notes on which the judgment was founded were given in *part payment* for five hundred acres of the land levied on. The proceedings, in assigning the homestead to claimant, showed that in the application made therefor, claimant, after describing the land, added—" \$2,000 00 in gold." This was in 1868. The county surveyor stated in his return, under oath, that "to the best of his knowledge and belief the same was not worth more than \$2,000 00 in specie." These proceedings were introduced in evidence by the claimant. It is true, that it is not expressly stated, either by the applicant (the claimant) or by the surveyor, that the land was of the value of \$2,000 00 in specie. The application contains the expression " \$2,000 00 in gold." The surveyor states it was not worth more than that. The plaintiff testifies that the \$1,311 00, principal, due at the trial, was *part* of what was due for *five hundred* acres of the eight hundred acres levied on. Surely this was enough to require of claimant to show that the value of the whole at the trial was less than \$1,311 00 *in currency*, if he was going to rely on that fact. At least, we cannot, with that proof, send the case back for a new trial. If the Court committed any error it was an error that did no damage to claimant. The jury were restricted to the principal of the *fi. fa.* That was \$1,311 00. There was interest for more than eighteen months due at the trial. Section 3742, new Code, says: "Upon the trial * * * the damages shall be assessed upon *the whole amount then due* upon the execution, provided," etc. If there was error on this point it was against the defendant in error.

Judgment affirmed.

Gardner vs. Jeter—Gardner vs. Adams—Bohler vs. Schneider *et al.*

JOSEPH M. GARDNER, trustee, plaintiff in error vs. MORTIMER JETER, administrator, defendant in error.

JOSEPH M. GARDNER, trustee, plaintiff in error vs. JOHN ADAMS, defendant in error.

The Relief Act of October 18th, 1870, making the payment of taxes upon debts contracted prior to June 1st, 1865, a condition precedent to a recovery thereon, is unconstitutional.

Relief Act of 1870. Constitutional law. Before Judge JOHNSON. Talbot Superior Court. March Term, 1873.

The two cases above stated were submitted without argument. Sufficient facts are stated in the decision to render it intelligible.

MARION BETHUNE; W. A. LITTLE, by PEABODY & BRANNON, for plaintiff in error.

No appearance for the defendant.

WARNER, Chief Justice.

This case, and the case of the same plaintiff against Adams, were submitted together. The error assigned is the dismissal of each case by the Court for non-payment of taxes, as required by the Act of 1870. The dismissal of both cases for non-payment of taxes was error.

Let the judgment of the Court below, in each case, be reversed.

JOHN A. BOHLER, tax collector, plaintiff in error, vs. ERNEST R. SCHNEIDER *et al.* defendants in error.

1. The Act, approved 20th February, 1873, imposing a special tax on wholesale dealers in malt liquors, is not in violation of the 27th section of Article I. of the Constitution of the State, which says "taxation on property shall be *ad valorem* only, and uniform on all species of property taxed."

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2. Such a tax is a tax on a business, occupation, or calling, as decided in *Burch vs. Mayor and Aldermen of Savannah*, 42 Georgia 596, and hence is not a tax on the sale of liquors, which, by the 3d section of Article VI. of the Constitution, may be assessed for educational purposes.
3. A tax levied on such whole saleddealers is not void for uncertainty, on the ground that the law nowhere defines what constitutes a wholesale dealer. That is a fact that can be determined like all other facts, as, for instance, whether the party taxed as a practicing attorney or assessed as the owner of certain property, is such attorney or owner. It may be ascertained in cases like this, under the provisions of section four of the Code, from experts in such business, and other proper evidence. The question whether the person so taxed is a wholesale dealer, cannot be raised on a bill to enjoin a tax collector from collecting a tax so assessed.

Constitutional law. Tax. Injunction. Before Judge GIBSON. Richmond County. At Chambers. June 4th, 1873.

The tax collector of Richmond county, having assessed a license tax of \$250,00 upon each of the defendants in error, as wholesale dealers in malt liquors, under section 2, paragraph 9, of the Tax Act, approved 20th of February, 1873, and executions having been issued therefor upon their failure to pay, they filed their bill to enjoin the levying and collecting of said executions—maintaining that they were not wholesale dealers, in the proper sense of the term; that the Act is unconstitutional and void, because though called a license tax, it is in fact a tax upon property, and should be uniform and *ad valorem*; that even if it is a specific tax, it is not a tax levied under circumstances authorized by the Constitution, viz: for educational purposes; that even if it is a special tax and levied for educational purposes, it is still unconstitutional, in that it is not *ad valorem*; that the tax collector is seeking to enforce such Act for a time when it was not obligatory upon the inhabitants of this State; and that if it is a license tax, that authority is alone conferred upon the city of Augusta.

The tax collector, by his answer, maintained that he had assessed said tax on the first day of April, 1873, when said

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Act was of force and obligatory on the inhabitants of this State; that said Act is constitutional; it does not impose a tax on property which must be uniform and *ad valorem*, but a special or license tax on business; that he assessed said tax against said parties as wholesale dealers in malt liquors, which business they were transacting at said time in said county, and upon their failure to pay said tax, he proceeded to issue executions therefor, in obedience to law, and under instructions of the Comptroller General, to hold liable, among others, "dealers who sell ale and porter in bottles packed in casks, by the cask;" that said parties were wholesale dealers in malt liquors, and legally liable for the tax; that as there could be no judicial interference with the collection of a State tax—which this is—he protested against the granting of the injunction, as without warrant of, and in violation of law.

The Chancellor sanctioned the bill, and ordered the injunction to issue. Whereupon the defendant excepted.

CLAIBORNE SNEAD; J. C. C. BLACK, for plaintiff in error.

This tax is authorized by the Act approved February 20th, 1873: See Acts 1873, p. 64. This Act is constitutional: See Constitution of 1868, Art. VI. sec. 3; *Kenny et al. vs. Harwell*, 42 Ga., 416.

The Judge granted the injunction because the tax was neither *ad valorem* nor uniform. This special tax authorized by Article VI. section 3 of the Constitution, is an exception to the rule, requiring taxation to be uniform and *ad valorem*: 42 Ga., 416, *Cooley's Constitutional Limitations*. See p. 496.

The Act was obligatory, having been approved February 20th, 1873, and published within ten days after the adjournment of the session, by resolution, approved February 19th, 1873. The tax was assessed 1st April, 1873, a month or more after the publication of the Act: See Pamphlet Acts 1873.

The Act of December 24th, 1791, giving the city of Augusta "sole regulation and power of governing and directing

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taverns, and granting licenses," is repealed by the Act of February 20th, 1873, and the Constitution of 1868, Article VI. section 3, if there is any conflict between them. But we maintain that they are not in conflict. The authority conferred on the city of Augusta by the Act of 1791, cannot be authority to license all businesses, but a proper construction of the Act, limits the authority to grant licenses to taverns or *retail dealers*. The Act of 1873 levies a tax on *wholesale dealers*. Under the Act of 1791, the city of Augusta may license the business for the city. Under the Act of 1873, the State levies a State tax for the county in which the business is carried on. The use of the term *license tax* may somewhat confuse the question. But in fact this is a special tax, as authorized by Article VI. section 3, of the Constitution, *to be devoted to the support of common schools*. Was it contemplated that the city of Augusta should so devote it?

It was necessary for the Act to devote it to the common school fund, it is already devoted by the Constitution.

The Court was prohibited from interference by injunction: Code 3618; 45 Ga., 85.

BARNES & CUMMING, for defendants.

1st. The paragraph of the Act under which the license tax is assessed provides that the tax shall be assessed against wholesale dealers in malt liquors. The complainants deny that they are wholesale dealers in malt liquors. An issue of fact is raised which can only be decided by a jury.

2d. The Act is void for uncertainty. Neither the Act in question nor any other statute of the State defines what is a wholesale dealer in malt liquors. Neither is there any law authorizing the Comptroller General to prescribe a definition. For him to attempt it, is to attempt the exercise of legislative power. It cannot be defined by a resort to dictionaries, nor by the usages of trade in its sale to dealers or consumers. It can only be defined by statute, and just as a retail dealer in *spirituous* liquors is defined by statute.

Is it a tax or a license? If a tax, it is an attempt on the part

of the Legislature to impose on the sale of malt liquors, or the owners who sell the same in large quantities, a burden for the support of Government not imposed on other citizens. It is to all intents and purposes a tax on property. As such it is an unconstitutional tax, because it is not *ad valorem* and uniform: Cons., Art. I. sec. 27; 41 Ga., 21.

If not a tax on property, but a specific tax, as provided for in third paragraph, Article VI. Constitution, it should be an *ad valorem* tax: Judge WARNER, 42 Ga., 427.

Again, if a specific tax, then it could only be assessed for educational purposes. The Act does not appropriate it to educational purposes. Former Tax Acts did, in terms, make such appropriation of such taxes: See Tax Acts of 1868 and 1869. The Comptroller General has no right so to appropriate it. Who shall draw it from the treasury and so appropriate it? This can only be done by law: Cons. Art. III. sec. 6, paragraph, 1. Such law can be passed only by the Legislature. It is not for any executive officer to assume its functions.

If it is not a tax but a license, then the sole power of granting the license has been delegated to Augusta: Act of 24th of December, 1791; Watkins' Dig. 453. This Act not repealed by Tax Act of 1873: 15 Ga., 361. And in force by virtue of the Constitution: Art. XI. par. 4.

At the time of the passage of the Act of 1791, the Constitution, then in force, did not prohibit in the body of the Act any matter different from what is expressed in the title: See Cons. 1789. The delegation of this power to the cities of Savannah and Augusta applies to wholesale as well as retail licenses. Those cities, under the Act, have exercised the powers for three quarters of a century, and its exercise has been acquiesced in by the State.

It is said, however, there cannot be judicial interference, this being a State tax, it being prohibited by section 3618 of the Code. The tax in question is not a tax under the Code. Judicial interference repeatedly recognized by this Court: 3 Kelly, 233; 43 Ga., 480; 44 Ga., 388. In 42 Georgia, the Court



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divided. In 45 Georgia, 85, the Court cautious to confine its decision to the special case under consideration: See also, 27 Ga., 354. Are the Courts open to some citizens and closed to others? Are some remitted to the action at law against the tax collector, and others not? Is section 1 of Article I. of the Constitution without meaning?

The remedy of an action at law against the tax collector, no remedy at all.

The 3618th section of the Code unconstitutional: Cons. Art. I. sec. 5; also, Art. I. sec. 3; Cooley's Cons. Lim., 521.

If this be a license, then not prohibited by section 3618 of Code. That section limited to taxes. A license not a tax: 36 Ga., 460.

In laws imposing taxes, if there be a real doubt, whether the intention of the Act was to levy the tax, that doubt should absolve the tax payer: 8 Ga., 23. The taxing power should be kept strictly within the limits of the law: 10 Allen, 575.

TRIPPE, Judge.

1. The Act of February 20th, 1873, imposed a special tax on wholesale dealers in malt liquors, and the defendants in error complain that the same is in violation of Article I. section 27 of the Constitution, which says, "taxation on property shall be *ad valorem* only, and uniform on all species of property taxed." The Chancellor granted an injunction restraining the collection of such tax, and the tax collector excepted. This case, so far as it involves that point, comes clearly within the decision made in the case of *Burch vs. the Mayor and Aldermen of Savannah*, 42 Georgia, 596.

2. This decision seems to have escaped the notice of counsel on both sides, and also of the Chancellor who granted the injunction. It decides that the municipal authorities of Savannah could assess a special tax on *retail dealers* in liquor within that city; that such a tax was not a tax on property, but on a business, occupation, or calling, and was not an illegal tax under the provision of the Constitution quoted above. If a municipal

corporation, can impose such a tax—a tax on a business or occupation, surely the State has equal authority. For, as stated in that case, this Court has held that the limitations upon the taxing power, in the Constitution, apply as well to cities and towns as to the Legislature. If the former are not inhibited by the Constitution from assessing such a tax, neither is the Legislature. As that decision was made in 1871, nothing further need be said than to call attention to it. It is under the principle therein settled that the special tax on doctors, lawyers, dentists and many others, which have never been questioned, have been assessed and collected for many years before, as well as since the adoption of the present Constitution.

3. A tax on wholesale dealers in malt liquors is not void for uncertainty, on the ground that such dealers are nowhere by law defined. The law does not define what a dentist is, nor is there any legal rule prescribed for ascertaining who shall come within the description of many other occupations upon which a tax is imposed. Section 4, new Code, provides, amongst other rules for governing in the construction of statutes, the following: "The ordinary signification shall be applied to all words, except words of art, or connected with a particular trade or subject matter, when they shall have the signification attached to them by experts in such trade, or with reference to such subject matter." Under this rule a tax collector could easily inform himself, after ascertaining the facts, whether a particular person fell within the class taxed. This he could do as easily as he could ascertain whether a certain party was a practicing attorney or was the owner of certain property.

As to the right of a party complaining in such a case, to an injunction restraining the tax collector from collecting the tax due or claimed to be due the State—the question has often been before this Court: See 21 *Georgia*, 59; 27 *Georgia*, 357; 33 *Georgia*, 622; 45 *Georgia*, 85. Those cases settle the principle that no such right exists as will entitle the tax payer to an injunction for the purpose of testing, by judicial

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intervention, whether or not he is in fact liable to the tax assessed.

We think that the injunction against the tax collector of Richmond county was improperly granted.

Judgment reversed.

THE SAVANNAH, SKIDAWAY AND SEABOARD RAILROAD COMPANY, plaintiff in error, *vs.* THE COAST LINE RAILROAD COMPANY, defendant in error.

1. On December 20th, 1866, complainant was incorporated and authorized to construct a railroad from a point within the corporate limits of the city of Savannah, to the Isle of Hope and Skidaway Island, and to construct branch railroads, etc. On July 22d, 1868, the Mayor and City Council of Savannah passed an ordinance granting to complainant the exclusive right of way for ten years, and for such further time as the Legislature might grant, over all the streets in the city of Savannah (with certain exceptions,) for the purpose of connecting its line of railway with the streets of said city by horse railway cars, etc., and to construct a street railroad and such branches as may be necessary in and along said streets, etc. It was further declared by said ordinance that complainant should, within three years from the date thereof, have their street railway in running order through certain streets, on penalty of forfeiture of the franchise. On September 24th, 1868, the General Assembly passed an Act confirming to the complainant all the rights conferred on it by the aforesaid ordinance, and extending the enjoyment of the franchise to thirty years. On October 10th, 1868, the defendant was incorporated and authorized to construct a railroad from such point in the city of Savannah as might be authorized by the Mayor and Aldermen of said city to any point or points on Wilmington Island. This grant to the defendant to construct a railroad [between the points designated in said Act, does not necessarily interfere with the complainant's franchise to use and operate horse railway cars in the streets of the city, for the purpose of connecting its line of railway with said streets.
2. Whether the complainant has performed the condition annexed to its grant so as to entitle it to the enjoyment of the exclusive franchise claimed, the evidence is conflicting; an injunction, therefore, should not be granted until the final hearing.

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Injunction. Franchise. Corporations. Conditions. Street railroads. Before Judge HANSELL. Chatham county. At Chambers. November 5th, 1873.

For the facts of this case, see the decision.

GEORGE A. MERCER; HARTRIDGE & CHISOLM, for plaintiff in error.

JACKSON, LAWTON & BASINGER; RUFUS E. LESTER, for defendant.

WARNER, Chief Justice.

This was a bill filed by the complainant against the defendant, praying for an injunction to restrain it from laying down a horse railroad track in Broughton and Bolton streets in the city of Savannah. On hearing the bill, answer of defendant, and the affidavits exhibited by the respective parties, the presiding Judge refused to grant the injunction prayed for, whereupon the complainant excepted. On the 20th of December, 1866, the complainant was incorporated by an Act of the General Assembly, and authorized to construct and maintain a railroad for the transportation of produce, merchandise and passengers, from a point within the corporate limits of the city of Savannah, to the Isle of Hope and Skidaway Island, and to construct and maintain branch railroads beginning at such points on the main line, as the directors of said company may select, running to Montgomery and White Bluff. By the 6th section of the Act, the said company were entitled to operate said railroad by steam or horse power, and have the exclusive use of the same for their cars, or other conveyances. On the 22d of July, 1868, the Mayor and City Council of Savannah passed an ordinance, by which it is declared that the complainant should have the exclusive right of way for ten years, and for such further time as the Legislature of the State might grant, over all the streets in the city of Savannah, excepting such as are intersected by squares, and those less than forty-five feet wide, for the purpose of con-

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necting their line of railway with the streets of the city, by horse railway cars, or carriages, and for transportation of passengers and their baggage, and to construct a street railroad, and such branches, etc., as may be necessary, in and along said streets, and to use, own, and operate the said road and cars for the full term aforesaid. It was further declared by said ordinance, that said company should, within three years from the date thereof, have their street railway in running order, through West Broad street, from Liberty to Bay, through Bay to East Broad, through East Broad to Gaston, and through Whitaker from Bay to Anderson, and through Drayton from Bay to Anderson, on penalty of forfeiture of this franchise. It was also declared by said ordinance that the tracks of said street railroad shall be laid down in the best and most approved mode of constructing street railways, and exempted the company from city taxation for four years from the date of the ordinance. On the 28th of September, 1868, the General Assembly passed an Act granting and confirming to the complainant all the rights, privileges and franchises conferred on it by the aforesaid ordinance of the City Council of Savannah, and extended the enjoyment of the franchise to thirty years, and also providing that the State should not have the power of withdrawing the franchise granted. On the 10th of October, 1868, the General Assembly passed an Act incorporating the defendant, and authorizing it to construct a railroad from such point in the city of Savannah as might be authorized by the Mayor and Aldermen of said city, to any point or points on Wilmington Island. This Act was amended in 1872, changing the name of the company, and authorizing the railroad to pass conveniently near the Cathedral and Bonaventure cemeteries, and to be extended therefrom to any other point or points on the coast of Chatham county.

1. It will be observed that the exclusive right claimed by the complainant under its charter, is to use and operate horse railroad cars in the streets of Savannah, for the purpose of connecting its line of railway with the streets of the city by

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horse railway cars or carriages, whereas, the grant to the defendant's company, is to construct a railroad from a point in the city, to be designated by the Mayor and Aldermen, to Wilmington Island, or by the amended Act, to any other point on the coast of Chatham county. This grant to the defendant to construct a railroad between the points designated in the Act of the General Assembly, does not necessarily interfere with the complainant's franchise to use and operate horse railway cars in the streets of Savannah, for the purpose of *connecting* its line of railway with the streets of the city by horse railway cars or carriages. The General Assembly may have considered it for the interest of the public that a railroad should be constructed from some point in Savannah, to the coast, notwithstanding the grant to the complainant to use and operate horse railway cars in the streets of the city, in connection with its line of railway. The grant to the defendant is not to use and operate horse railroad cars in the streets of the city, but the grant to it is to construct a railroad from a point in the city to be designated, to Wilmington Island, or to any other point on the coast of Chatham county. The objects and purposes of the two grants are essentially different, and the grant to the one does not necessarily interfere with or impair the grant to the other. To construct a railroad under the grant to the defendant, between the points designated, is one thing—to construct a horse railway track in the streets of the city for the purpose of *connecting* its line of railway with the streets of the city, and use, own and operate the same under the grant to the complainant, is another and quite a different thing.

2. It is true, the City Council, by its ordinance of 28th of April, 1873, granted the right of way to the defendant for its line of railway between the points designated in its charter, over certain described streets in the city, on the terms and conditions therein specified, one of which was that the railroad to be constructed by the defendant on its line through the city, should be a single track horse railway. This ordinance was nothing more than a police regulation for the pro-

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tection of the interests of the city, in the construction of the defendant's railroad under its charter, on its line from the point designated in the city to the coast. Besides, the grant of the exclusive franchise to the complainant over all the streets of the city, to use and operate horse railroad cars for the period of time specified, was granted on the *express condition* that it should, within three years from the date of the grant, have its street railway in running order through the streets designated in the Act containing the grant, and the complainant must be considered as having accepted it with the conditions annexed thereto. The ordinance of the City Council, of 29th March, 1871, extending the time, does not help the matter, because the City Council did not have the legal power or authority to alter or change the terms of a legislative grant made by the General Assembly of the State. The exclusive franchise claimed by the complainant, as well as the exemption from city taxation for four years, were privileges granted to it by the State on the expressed condition annexed to the grant, that it should, within three years from the date thereof, have its street railway in running order through the streets designated. Whether the complainant has performed the condition annexed to its grant, so as to entitle it to the enjoyment of the exclusive franchise claimed, the evidence in the record is conflicting. This is not a question of forfeiture of the complainant's charter, but it is a question of performance of the condition annexed to its grant, so as to entitle it to the enjoyment of the exclusive franchise which it claims. There can be no doubt that an exclusive franchise granted to a natural or artificial person, is a species of property which a Court of equity will protect, on a proper case being made. But when there is a reasonable doubt arising from the conflict of evidence, as to the complainant's right to the enjoyment of the exclusive franchise claimed under its charter, an injunction should not be granted until the final hearing of the cause. In view of the facts disclosed in the record before us, we find no error in refusing the injunction prayed for.

Let the judgment of the Court below be affirmed.

RICHMOND A. REID, plaintiff in error, *vs.* **ROBERT C. HUMBER**, defendant in error.

An agent of a factor is not liable to a third person for failing to transmit his orders to the principal of the agent as to the sale of cotton consigned by such third person to the factor.

Principal and agent. Factors. Before Judge **BARTLETT** Putnam Superior Court. March Term, 1873.

This was an action on the case brought by Humber against Reid, alleging that Humber, in the year 1867, delivered to Reid, at Eatonton, as the agent of Sims & Company, factors and commission merchants in Savannah, a lot of cotton, to be consigned to said factors with instructions not to sell said cotton without further orders from Humber; that Reid took possession of said cotton, sent it to said factors, and negligently failed to communicate said order, whereby said cotton was sold at thirteen and one-half cents per pound, when, if said orders had been obeyed, Humber would have realized thirty-three cents per pound. Suit was brought for the difference in the prices above stated.

The defendant pleaded as follows:

1st. General issue—not guilty.

2d. That defendant was the agent of Sims & Company, and entered into no understanding and agreement in respect to the sale and consignment of the cotton, and did not exceed his authority in the premises.

3d. Former recovery, in this: that, at the May term of Chatham Superior Court, in the year 1868, Humber brought his action on the case against Sims & Company, alleging that he was damaged by the sale, contrary to and against orders, of this identical lot of cotton, and that at the July term of said Court, the said Sims & Company recovered a judgment against the said Humber, which still remains in full force and effect.

The jury returned a verdict for the plaintiff. The defendant moved for a new trial, upon the ground that the Court erred in charging the jury as follows:

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“The law imposes upon a party who represents himself as the agent of another, the obligation to communicate to the principal the instructions given by persons dealing with such agent, and if the jury conclude, from the evidence, that the plaintiff instructed the defendant, as agent, to instruct his principal not to sell his cotton until further orders, (and no form of words is necessary to convey such instructions,) if the words used were sufficient to convey such instructions, and the defendant failed to communicate such instructions, he is guilty of a *tort*. If the jury should believe from the evidence that the plaintiff has been damaged by such *tortious* act, he is entitled to recover such amount of damage as the evidence shows he has sustained.”

The motion was overruled, and the defendant excepted.

LAWSON & FITZPATRICK, for plaintiff in error.

REESE & REESE, for defendant.

TRIPPE, Judge.

It was conceded in the argument that, unless the rule be changed by the Code, an agent is not liable to a third person for damage resulting to him from the non-performance or neglect of a duty which the agent owes to his principal. To this point the authorities are numerous: Story on Ag., secs. 308, 309, 310; Sh. and R. on Negligence, sec. 111; 1 Hilliard on Torts, 123. This was admitted by counsel in the argument, but it was claimed that, by sections 2213 and 2951, new Code, the law is changed. In the first of those sections it is declared, that an agent is responsible “for his own *tortious* acts, whether acting by command of his principal or not.” The next section (2951) defines a *tort* to be “a legal wrong committed upon the person or property, independent of contract.” It may be either, 1st. A direct invasion of some legal right of the individual. 2d. The infraction of some public duty, by which special damage accrues to the individual. 3d. The violation of some private obligation, by which like damage accrues to

the individual. In the former case, no special damage is necessary to enable the party to recover. In the two latter cases such damage is necessary. Section 2213 does not change or add to the old law, as to the liability of an agent. He was always responsible for his own *tortious* acts. Nor do we see wherein the other section makes any change, or imposes any liability on the agent in this case. It does not come within the rule as set out, either under the first or second heads of that section. There was no direct invasion of some legal right of the defendant in error, nor was there any infraction of a public duty. The third head is the violation of some private obligation by which damage ensues. Section 2953 aids in the construction of this. It says, "private duties may arise either from *statute*, or *flow from relations* created by *contract*, express or implied." Putting the two sections together, or rather the third division of sections 2951 and 2954, and there must be special relations existing between the parties, and those relations created by contract. It is true that section 2951 says a *tort* is a legal wrong committed on the person or property, *independent of contract*. That is true. There may be *torts* without the breach of any contract. A shoots the horse of B; he commits a *tort*, but there was no contract violated. Section 2954 shows that where the *tort* is for the violation of any private obligation, that obligation results from the relations of the parties, created by contract, express or implied. Now, what relations existed between the plaintiff and defendant in this case, created by contract, either express or implied? To constitute a legal contract, there must be a consideration. Was there any here? A party shipped his cotton to his factor; he then told the agent of that factor, who was at another depot from where the cotton was shipped, that he did not wish the cotton sold until further orders. Was there a legal obligation on that agent towards the shipper to transmit his directions to the factor. From what did it spring? The agent was bound to his principal, and would have been responsible to him for any damages recovered against the principal, on account of the agent's failure. And the shipper may have been entitled

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to recover against the principal, either for the neglect of the agent in not forwarding the instructions, or for the violation of them by the principal, if they had been communicated. But we cannot see that there was any such relations between the agent and the shipper to render the agent liable to him for the neglect. Had the shipper made the agent his own agent in the matter for a consideration, the case would be different.

We find nothing in the Code changing the old rule, and as the charge of the Court was in conflict with what we think was the law of the case, a new trial should be granted.

Judgment reversed.

MILTON MALONE, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

1. Where the defendant was placed on trial, and a mistrial was ordered on account of the sickness of one of the jury, it was not error in the Court to place said defendant again on trial during the same term of the Court.
2. A motion for continuance was submitted upon the ground that the defendant was too sick to engage in the trial, and the Court summoned two physicians, who disclosed, under oath, that he was suffering from the effects of alcohol, from nervous derangement, and on this statement, passed the case to a time indicated by the physicians. When he was again called on to announce, the same motion was submitted. The Court asked his counsel if his condition had grown worse. They replied that it had not. Upon their stating that they had nothing further to offer in support of the ground of alleged sickness, it was not error in the Court to overrule the motion.
3. Where the movements of a witness are evidently controlled by the friends of the defendant, and the Judge certifies that he had no doubt, from all that had occurred in the case, that the motion for continuance was made for delay only, and no compulsory process had been applied for to compel her attendance, this Court will not interfere with the discretion of the Court below, exercised in overruling the motion for continuance, on account of the absence of said witness.
4. The Court has discretion where a defendant is placed on trial at the term of the Court at which the indictment was found, whether to sustain a motion for a continuance or not, even though the requirements of section 3471 of the Code have been complied with.
5. An indictment found by a grand jury, constituted by filling up the

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places of the drawn grand jurors who failed to appear, by tales jurors, as provided by the Act of 1869, is valid.

6. A challenge to the array of jurors put upon defendant, on the ground that the various panels have been drawn from a box containing the names of only one thousand persons, whereas the number of persons in the county subject to jury duty, from whom he has a right to select, amount to four thousand, was properly overruled, where no proof was offered in support thereof.
7. This Court announces to the public, with all the emphasis its judgment can impart, that provocation by words, threats, menaces or contemptuous gestures will, in no case, be sufficient to free a person, who kills another by shooting him, from the guilt and crime of murder.
8. The reasonable doubt, which would acquit the defendant, must be pertinent to the matter in issue, and arising out of the evidence, or the want of evidence.
9. The charge that drunkenness could be looked to, to ascertain and determine the condition and state of the defendant's mind, and to throw light upon the inquiry whether there was malice, was quite as favorable to the defendant as he had a right to expect.
10. Whether the defendant and the deceased were strangers to each other was a question of fact for the jury, and if they were, and one was killed by the other without any considerable provocation, the law will imply malice.
11. The verdict should be read to the jury before they are polled.
12. If the bailiff who attended the jury ate and slept in the same room with them, it was incumbent on the defendant to have shown it by competent evidence.
13. The verdict is supported by the evidence.
14. Newly discovered evidence which is merely cumulative is no ground of new trial.
15. Evidence is cumulative when it goes to the fact principally controverted upon the trial, and respecting which the party asking for a new trial produced testimony.
16. Newly discovered evidence, which might have been obtained by the exercise of ordinary diligence before the trial, is no ground of new trial.

Criminal law. Murder. Mistrial. Continuance. Indictment. Grand jury. Jury. Challenge. Reasonable doubt. Drunkenness. Malice. Polling jury. New trial. Newly discovered evidence. Cumulative evidence. Before Judge HOPKINS. Fulton Superior Court. October Term, 1872.

The defendant pleaded in abatement to the indictment, upon the ground that it was found by only ten of the original grand

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jurors who were drawn, the panel having been filled with talesmen summoned for that purpose.

The plea was overruled, and the defendant excepted.

The defendant challenged the array of jurors put upon him, upon the ground that the various panels composing the same were drawn from a box containing the names of only one thousand persons, while the number of persons in the county of Fulton subject to jury duty, and from whom the defendant had the right to select a jury, amount to four thousand or more.

The Judge attached a note to this challenge, in which it is stated that no proof was submitted in support of the allegations therein contained. The challenge was overruled, and the defendant excepted.

With the above statement, this case will be found fully reported in the opinion.

W. A. HAWKINS; GARTRELL & STEPHENS; J. F. POULSON; HILL & CANDLER; D. P. HILL, for plaintiff in error.

JOHN T. GLENN, Solicitor General; S. B. SPENCER; THRASHER & THRASHER, for the State.

WARNER, Chief Justice.

The defendant was indicted for the murder of Frank Phillips, and put on his trial therefor, at the first term of the Court after the offense was alleged to have been committed and indictment found. During the progress of that trial, and before its termination, one of the jurors was taken sick and a mistrial was ordered by the Court for that cause. During the same term of the Court, (the Court being held for several weeks,) the case was again called up for trial, and another trial was had, which resulted in a verdict finding the defendant guilty. A motion was made for a new trial on the several grounds specified and set forth in the record, which was overruled by the Court, and the defendant excepted. When the case was called the second time for trial, the de-

fendant made a motion for a continuance on the ground that the case could not legally be tried again during the same term of the Court; that he was then too sick to engage in the trial, and, also, for the absence of Emma Gilmore, a material witness for him, who had been subpoenaed, and who was present and testified on the first trial, states the material facts expected to be proved by her; that when she was first subpoenaed, she resided in the county, but did not state that she then resided in the county, or where she resided; that said witness was not absent by his consent or procurement; that he expected to be able to procure her testimony at the next term of the Court; that the application was not made for delay, but to enable him to obtain the testimony of said absent witness.

There is nothing in the laws of this State which prohibited the Court from proceeding with the second trial as it did, but, on the contrary, it was its duty to have done so, provided the term of the Court would extend to such a length of time as would allow the trial to be had. As to the sickness of the defendant, the presiding Judge certifies "that when the case was called at the appointed time for trial, it was stated that defendant was too sick to come into Court. I summoned two physicians, who, under oath, disclosed that defendant was suffering from the effects of alcohol; that there was nervous derangement. I then passed the case for a time which was indicated by the physicians. When he was again called on to announce, this affidavit was presented. I asked his counsel if his condition had grown worse, and they replied that it had not. I then asked them if they had anything further to offer in support of the ground of alleged sickness, and they said they had not. I was satisfied from all that had occurred in open Court, that defendant was in a proper condition to proceed with the trial." This certificate of the presiding Judge, as to the sickness of the defendant, disposes of that ground made in the showing for continuance. In relation to the absence of Emma Gilmore, it appears in the record that a motion had been made by the defendant on the first trial to

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continue the case on account of her absence and others, which was overruled, and when that was done, she did appear in Court and testified for the defendant, and in that testimony disclosed facts which clearly indicate that her movements in coming from Chattanooga here to testify, were controlled by friends of the defendant; in other words, her testimony clearly shows that her movements in attending the Court were regulated by the wishes of the defendant's friends. She had left the State before the trial and gone to Chattanooga. When the motion for a continuance was overruled on the first trial, she returned here again in time to testify in the case in favor of the defendant, and is absent again when the case is called for trial the second time. These facts were all known to the Court when the motion for a continuance was made at the second trial. The presiding Judge certifies that he had no doubt, from all that had occurred before him in the progress of the cause, that the showing was made for delay only and to avoid a trial. Upon the former trial, Emma Gilmore was produced and examined, and the circumstances of her absence, and the means employed to get her to be present at the trial, are shown in her testimony. The Court admitted her testimony, taken down by the reporter on the first trial, to be read in evidence in favor of the defendant on the second trial. The argument for the plaintiff in error is, that when a defendant is indicted for a criminal offense and a motion is made for a continuance at the term of the Court at which the indictment is found on account of the absence of a witness, and he complies with the requirements of the 3471st section of the Code in making his affidavit for such continuance, the Court has no discretion under the law but to grant it. This argument is entirely too comprehensive and proves too much, as applicable to the continuance of criminal cases, or any other class of cases, inasmuch as it would deprive the Court of the power and authority to exercise its own judgment and discretion as to the continuance of any criminal case, and make the defendant the judge thereof, under the law, instead of the Court. If the defendant swears that the application for a continuance

on account of the absence of a witness is not made for the purpose of delay, and the presiding Judge should see the witness standing in the Court room, according to this argument he would have no discretion to be exercised in refusing the application for a continuance. This is not the rule applicable to the continuance of either criminal or civil cases, as we understand it. The Superior Courts are clothed by the Constitution and laws of the State with original jurisdiction for the trial of criminal cases, and the Judges thereof should have, and are presumed to have, sufficient judgment and discretion to make a practical application of the law relating to every motion for the continuance of a criminal case which may be made before them. The law devolves that duty upon them, and when they have exercised their judgment and discretion in refusing a continuance, this Court will not control it, unless that discretion has been grossly abused. In this case, the defendant and his counsel knew that the witness had left the State after she had been first subpoenaed, and had returned to the State and testified on the first trial, and when they were notified that the case would be tried again, it was their plain duty to have applied for compulsory process to have compelled her attendance, either to have had her retained in custody to give evidence, or recognized for that purpose. They had ample time to have done so, and as they knew the migratory character of the witness, there was an entire want of diligence in this respect on their part. In view of all the facts disclosed in this record, we cannot say that the Court below abused the discretion vested in it by law, in overruling the defendant's motion for a continuance. In our judgment on this branch of the case, we have left out of view altogether the counter-showing made by the State, and have considered the motion made for a continuance wholly independent of that counter-showing.

There was no error in overruling the defendant's plea as to the grand jury that found the bill of indictment. The certificate of the presiding Judge states that all of the drawn grand jurors did not appear, and that he filled up the jury with tales

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jurors, as provided by the Act of 1869, and the jury thus made up found the bill. The 8th section of the Act of 1869 declares, "that when, from challenge, or from *any other cause*, there is not a sufficient number of persons in attendance to complete the panel of grand jurors, the Court may order the sheriff or his deputy to summon persons, qualified as heretofore required, sufficient to complete the panel."

There was no error in overruling the defendant's challenge to the array of jurors put upon him by the State at the last trial. The presiding Judge certifies that the cause of challenge contained in the first ground of the motion, occurred on the first trial, and not on the second; that the last ground contained in the motion was made on the last trial, but as no proof was offered to sustain it, it was overruled. This disposes of the technical objections and exceptions made by the counsel for defendant before the evidence in the case was submitted to the jury.

It appears from the evidence in the record that the defendant shot the deceased in a house of ill fame, at night, in the city of Atlanta, in the month of August, 1872. It does not affirmatively appear in the evidence that the defendant and deceased knew each other before they met in that house that night, and we think it to be a fair inference therefrom that they were not personally acquainted with each other; whether they knew each other by sight only, is not so clear. Both were young men, the deceased the youngest of the two. Deceased went to the house first, and after a short time defendant came there. The evidence is, that both had been drinking and were somewhat excited by liquor. It also appears in the evidence that a short time before the killing defendant applied to a saloon keeper, who had his pistol, for it, and said, as he put it in his pocket, "You will hear from me in fifteen minutes." The distance from the saloon to the house where the killing took place is about three hundred yards. About eight minutes thereafter, defendant shot deceased in the house to which he went. There is some conflict in the evidence as to what was said by the deceased after the defendant got there. The weight

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of the evidence is, that one of the women of the house was near defendant and deceased, when deceased put his hand on her and remarked to defendant, "You cannot have her," or, as one of the witnesses states it, the deceased laid his hand on the woman's shoulder and said, "Mr. Malone, you can't have this girl." Another witness, Emma Gilmore, states that deceased put his hand on his hip and said, "I will shoot, you son of a bitch, if you touch my woman." The evidence is pretty clear that the deceased was unarmed, as no weapon was seen in his hands or found upon his person after his death. There is a conflict in the evidence as to the position of the deceased at the time of the shooting. Some of the witnesses state that when defendant said he would shoot his "God damned brains out," deceased held up his hands and said, "Let him shoot." Emma Gilmore states that deceased had his hands on his hip at the time he was shot, and said, "I will shoot," etc. The main question involved in the investigation before the jury was whether, under the evidence, the defendant was guilty of murder or voluntary manslaughter. Did the evidence show such a state of facts as would authorize the jury to find the defendant guilty of murder? Murder, as defined by our Code, is the unlawful killing a human being, in the peace of the State, by a person of sound memory and discretion, with malice aforethought, either express or implied. Express malice is that deliberate intention, unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

In order to have reduced the killing of the deceased by the defendant, to the offense of voluntary manslaughter, there must have been some actual assault made by the deceased upon the defendant, or an attempt by the deceased to have committed a serious personal injury on the person of defendant, or other equivalent circumstances to justify the excitement of passion and to exclude all idea of deliberation or

malice, either express or *implied*. Provocation by words, threats, menaces, or contemptuous gestures, shall, in no case, be sufficient to free the person killing from the guilt and crime of murder. Now, if we take the evidence offered by the defendant in this case, as to the words, threats, menaces, or gestures of the deceased towards the defendant at the time of the killing, are the same sufficient under the law to free the defendant from the guilt and crime of murder? What are they? That the deceased put his hand on his hip and said, "I will shoot, you son of a bitch, if you touch my woman." These are the words, threats, menaces and gestures, which it is claimed, under the law, will free the defendant from the guilt and crime of murder in shooting the deceased. Only that, and nothing more. This Court will avail itself of the present occasion to announce to the public from this bench, with all the emphasis which its judgment can impart, that provocation by words, threats, menaces or contemptuous gestures, will, in no case, be sufficient to free a person who kills another by shooting him, from the guilt and crime of murder. The law so declares, and it is the imperative duty of the Courts so to administer it, for the protection of society and human life. Mere words, threats, menaces or contemptuous gestures, are no considerable provocation in the eye of the law, and, therefore, malice *shall be implied*.

We find no error in the refusal of the Court to charge the jury as requested, or in the charge as given, in view of the evidence contained in the record. The charge of the Court as to a reasonable doubt of the guilt of defendant, was in exact accordance with the ruling of this Court in the case of *Long vs. The State*, 38 *Georgia Reports*, 491. The doubt must be a doubt pertinent to the matter in issue on trial, arising out of the evidence, or the want of evidence. The charge of the Court that drunkenness could be looked to, to ascertain and determine the condition and state of the defendant's mind and to throw light upon the inquiry whether there was malice, was quite as favorable a charge for the defendant as he had a right to expect under the law and facts of the case.

Whether the parties were strangers to each other, was a question of fact for the jury, and if they were, the law will imply malice when one stranger kills another stranger without any considerable provocation, the same as if they were not strangers, and there was no error in the refusal of the Court to charge the jury in relation to that question. There was no error as to the polling of the jury on the statement of facts certified to by the presiding Judge. When the jury brought in their verdict, defendant's counsel requested to have them polled. The Court directed the Solicitor General to take the verdict and read it in the presence of the jury; that being done, each juror was called and asked by the Court if the verdict as read was his verdict, and each juror answered that it was. The complaint is that the verdict was read to the jury by the Solicitor General before they were polled. The reading of the verdict in the hearing of the jury was right, so as to enable each juror to know what the verdict was before he was asked the question if he agreed to *that* verdict.

It does not affirmatively appear that the bailiff who attended the jury did eat or sleep in the same room with the jury, and the presiding Judge certifies that he did not know that he had done so. If such was the fact, it was incumbent on the defendant to have shown it by competent evidence, which the record fails to disclose.

There is sufficient evidence in the record to sustain the verdict of the jury. They were the exclusive judges of the credibility of the witnesses who were sworn on the trial of the case, and there was no error in overruling the motion for a new trial on the ground that the verdict was contrary to the evidence, and the weight of the evidence, according to the repeated rulings of this Court in similar cases. The fact of the killing of the deceased by the defendant was not disputed on the trial, and the only question for the jury was, whether the killing, under the circumstances as detailed by the witnesses, made him guilty of the crime of murder under the law, or guilty of an inferior grade of homicide, and they having

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passed upon that question, we cannot say that their verdict was not right under the law and facts of the case.

The Court did not err in overruling the motion for a new trial on the ground of newly discovered evidence. The newly discovered evidence is merely cumulative, and a new trial will not be granted for newly discovered evidence merely cumulative in its character. What is cumulative evidence? Evidence is cumulative when it goes to the fact principally controverted on the trial, and respecting which the party asking for a new trial produced testimony on the trial of the cause: *Grubb vs. Kolb*, 37 *Georgia Reports*, 459. The newly discovered testimony of Stokes relates to the same facts which were controverted on the trial, as to what the parties said and did at the time of the shooting, and the same remark may be made as to the newly discovered evidence as to the defendant having been drinking. There was evidence of his having been drinking on the trial.

If the newly discovered evidence had been introduced on the trial, it is not at all probable that it could have produced, or that it ought to have produced, a different result under the law. The plea of insanity was not relied on at the trial, and it is too late now to fall back upon that defense after the trial, when the facts now sought to establish it could as well have been ascertained before the trial, by the exercise of ordinary diligence, as since the trial, if, indeed, he was insane before the killing, which the newly discovered evidence fails to establish, and it does not show that he was insane *at the time of the killing*.

After a careful and laborious examination of the evidence contained in the record, and the several grounds taken in the motion for a new trial, we are all of the opinion that the judgment of the Court below refusing a new trial should be affirmed.

Let the judgment of the Court below be affirmed.

Malone vs. Hopkins.

MILTON MALONE, relator, vs. Honorable JOHN L. HOPKINS, Judge of the Superior Courts of the Atlanta Circuit, respondent.

1. Where a motion for a new trial was made at the term of the Court at which the verdict complained of was rendered, and was overruled, which decision was affirmed by this Court, to authorize a second motion, such an extraordinary state of facts would be required as would probably produce a different result, if a new trial should be granted; and such extraordinary state of facts must have been unknown to the defendant or his counsel, at the time of the first motion, and impossible to have been ascertained by the exercise of proper diligence for that purpose.
2. The signing of the bill of exceptions would necessarily make it the duty of the Judge to grant a *supersedeas* of the judgment of the Court.
3. There being no extraordinary facts set forth in the second motion for a new trial which would entitle the defendant to another hearing, the application for a *mandamus* to compel the Judge's certificate to the bill of exceptions, is refused.

New trial. Bill of exceptions. *Mandamus*. Practice in the Supreme Court. Before the Supreme Court. July Term, 1873.

Malone petitioned the Supreme Court for a *mandamus nisi* requiring the Honorable JOHN L. HOPKINS, Judge of the Superior Courts of the Atlanta Circuit, to show cause why a *mandamus* absolute should not issue directing him to certify the bill of exceptions presented to his decision refusing a new trial in the case of the State against petitioner, lately pending in Fulton Superior Court.

The motion for a new trial was as follows:

THE STATE OF GEORGIA vs. MILTON MALONE.

Indictment for murder, verdict of guilty, and motion for a new trial.

And now comes the defendant, by his attorneys at law, and moves the Court to set aside the verdict rendered in the above cause, and to grant him a new trial upon the following grounds,

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of which he knew nothing until about September 20th, 1873, and which came to his knowledge on or about that time, to-wit:

1st. Because he has learned that he can prove by one R. L. Turner, a citizen residing in the county of Fulton, in said State, that he was present at the house known as the "carriage factory" on the night of the homicide, saw the whole difficulty, and knows that the defendant shot Phillips in defense of his own life.

2d. Because he has learned since the trial that the jurors put upon him on said trial were selected, chosen and impaneled under a law of the State of Georgia, enacted and passed for the purpose of excluding from service as jurors a certain class of citizens, on account of their previous condition of race and color, and that the purpose of said law was political, so as to deprive persons belonging to the republican party from an equal participation in the rights and privileges of other citizens, and equality before the Courts of said State of Georgia, and that the said proceedings and law are in violation of the fourteenth amendment of the Constitution of the United States, and resulted in manifest wrong and injury to this defendant.

3d. Because James O. Harris, the sheriff of the county of Fulton, in selecting said panel of jurors which was put upon said defendant, confined himself to a certain class of white persons, being only one thousand in number, when there were citizens of said county, amounting to four thousand seven hundred, equally liable and competent, under the law, to do jury duty, and that the same were drawn, selected and summoned by the sheriff aforesaid, to exclude from the jury and the equal participation before the Courts of the class of colored persons residing in said county, and to make up the jury in said case from the selected class, and not so as to allow equality before the Courts to all the citizens of the United States.

4th. Because the only qualification of a juror, under the Constitution of the State of Georgia, is uprightness and intelligence, when the same should be impartiality, and by which

means the defendant was denied all the tests usual in the Courts of justice, to test the fairness and impartiality of jurors selected to try him.

5th. Because the defendant was insane at the time of the commission of said alleged offense, at his trial therefor, and is now, which facts were not known, as developed by the testimony of Dr. Charles Pinckney, in an affidavit hereto annexed, until since said trial.

Said motion was supported by the following affidavits :

1st. Affidavit of James G. Maull, to the effect that he was a member of the Convention which framed the present Constitution of the State of Georgia ; that he represented the county of Muscogee in the first Legislature assembled under the provisions of said Constitution ; that it is his belief and understanding that the clause of said Constitution organizing a jury system, known as paragraph 2, section 13, Article V., was inserted therein for the purpose of excluding colored persons, as a class, from the jury box, and by operation of law to prevent said class from serving on juries ; that the Act passed by the General Assembly for the purpose of carrying into effect the aforesaid provision, had also in view, in his opinion, the exclusion from the jury box of the colored people as a class.

2d. Affidavit of James O. Harris, to the effect that he was the sheriff of Fulton county, and was present when the jury box was made up by the commissioners appointed for that purpose ; that on the tax books there were two lists of tax payers, one of white and the other of colored persons, and the commissioners made up the jury box exclusively from the white list, without examining the list of colored persons at all ; that all the panels put upon the defendant at his trial were taken from the jury box made up as aforesaid.

3d. Affidavit of Charles Pinckney, to the effect that he is a practicing physician ; that he saw defendant for the first time on the morning of the day of the killing, and believed him insane, and so expressed himself to F. B. Palmer at the time ; that he has been defendant's physician ever since the homicide,

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and has all of this period believed, and does now believe, that defendant is at times an insane man, and that he was at the time of the killing in a condition of *mania a potu*; that deponent was a witness at the trial, and would have testified to these facts had the questions been propounded to him, but he did not feel called upon, on his own motion, so to do.

4th. Affidavit of F. B. Palmer, in reference to the remark made to him by Dr. Charles Pinckney, as to defendant's suffering from *mania a potu*.

5th. Certificate of A. E. Buck, clerk of the Circuit Court of the United States for the Northern District of Georgia, to the effect that the jurors selected from Fulton county for said Circuit Court consist of seventy, of whom forty are white and thirty are colored.

6th. Affidavit of defendant, to the effect that the facts set forth in the said motion for a new trial are true, to the best of his knowledge and belief, and have come to his knowledge since his trial, to-wit: about September 20th, 1873.

The State responded to said motion as follows:

1st. That at the October term, 1872, of this Court, a motion for a new trial in this case was made and overruled, which decision was affirmed at the July term, 1873, of the Supreme Court, and a second motion cannot be made, under the laws of this State.

2d. That substantially the same grounds were made and acted on in the former motion, and the defendant is, therefore, precluded from another hearing on said grounds.

3d. That the Constitution of the State of Georgia, and the laws passed under it, were made for the purpose of securing "intelligent and upright persons" as jurors, and not for any political purpose, or for the purpose of excluding colored persons, as members of the republican party, from the juries of this State.

4th. That the insanity of the defendant was made one of the grounds of the former motion, and was passed upon by the Court.

5th. That neither of the defendant's attorneys make oath

that they were not fully informed, at the time of making the former motion, of all the grounds set forth in the last motion.

6th. That the exclusion of colored persons from the jury cannot be complained of by the defendant, as he is a white man, and was tried by white men.

In support of this answer were attached the following affidavits :

1st. Affidavit of John R. Wallace, L. B. Langford, W. E. Spruill, and Daniel Pitman, Ordinary of Fulton county, to the effect that they were four of the five commissioners who selected the jurors for said county from the book of the receiver of tax returns, on or about the first Monday in June, 1872; that they made said selection and revision of said jury box impartially, without regard to race, color or previous condition, and placed upon the lists of jurors only such persons as they considered upright, intelligent and competent under the law; that the colored persons on said tax digest were not excluded from the jury box, as a class, at said selection; that uprightness and intelligence alone were looked to by the commissioners, and many white persons were left off who could not read and write, not considering them, for those and other reasons, intelligent; that others were left off as not considered upright. The names of the colored persons were discussed and omitted, some for want of sufficient intelligence, and others for want of uprightness; that the names of some of the colored persons were left off because exempt as ministers of the gospel and doctors; that the names of many white persons were omitted for the same reasons, and others because firemen; that no persons of color were placed on said list because the commissioners knew of none whom they considered competent except two or three, and they were exempt.

2d. Affidavit of H. V. M. Miller to the effect that he was a member of the Constitutional Convention of 1868, and that the section of the Constitution then adopted which reads as follows: "The General Assembly shall provide by law for the selection of upright and intelligent persons to serve as jurors," was reported by a committee, of which Amos T.

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Akerman was the chairman, and was adopted without debate or objection; that deponent did not vote for it for the purpose of excluding colored persons as a class from the jury box, but with the object in view of shutting out the ignorant and the vicious of all races; that members of the republican party were not excluded from serving as jurors as a class or as individuals.

3d. Statement with no signature attached, that Amos T. Akerman, chairman of the committee which reported the jury clause referred to in the foregoing affidavit, was late Attorney General of the United States of America under the administration of President Grant.

4th. Affidavits of John B. Langley, C. R. Pennick, Josh. Tye and A. P. Cassin, to the effect that the defendant, about the time of the homicide, before and after, conversed and acted as a sane man.

5th. Affidavit of L. T. Downs to the effect that up to the time of the homicide, he had known the defendant four or five years; that about fifteen minutes before the killing, defendant was in the deponent's grocery talking to McAlister and Cooper; that defendant was under the influence of liquor to some extent, but to all appearances was in his right mind, and talked as sensibly as he ever did; that there was nothing about the defendant that in the least indicated craziness or absence of his right mind; that the deponent saw him some two or three days before this walking on the sidewalk without his shoes on; that he then thought he looked as if he was crazy.

The motion for a new trial was overruled. A bill of exceptions, based on said ruling, was presented to the presiding Judge, who refused to sign and certify the same. Whereupon, a *mandamus nisi* from the Supreme Court was prayed for. This was refused in the decision which follows:

W. A. HAWKINS; J. F. POULSON; GARTRELL & STEPHENS;
D. P. HILL, for the relator.

JOHN T. GLENN, Solicitor General, for respondent.

WARNER, Chief Justice.

This is an application for a *mandamus* to compel the Judge of the Superior Court to sign and certify a bill of exceptions to the judgment of that Court in overruling a second motion for a new trial in the case of the State against Malone. The signing of the bill of exceptions would necessarily make it the duty of the Court to grant a *supersedeas* as to the execution of the judgment of the Court. It appears from the record that the defendant has been tried and found guilty of the offense of murder; that a motion was made for a new trial at the term of the Court at which the trial was had, which motion was overruled, and the defendant excepted, and prosecuted his writ of error to this Court, in which the judgment of the Court below was affirmed and the defendant sentenced to be executed, in accordance with that judgment of the Court. The defendant has now made a second motion for a new trial, and the question is, whether he has made such an "extraordinary case" as will entitle him to be heard a second time on that motion, under the laws of this State. By the 3668th section of the Code, it is declared that, "all applications for a new trial, except in extraordinary cases, must be made during the term at which the trial was had, but may be heard, determined and returned in vacation." The 3670th section declares, "in case of a motion for a new trial, made after the adjournment of the Court, some good reason must be shown why the motion was not made during the term, which shall be judged of by the Court. In all such cases, twenty days' notice shall be given to the opposite party." In this case the defendant *did* make a motion for a new trial at the term of the Court at which the trial was had, which has been overruled. To entitle the defendant to make a second motion for a new trial, after he has once been heard, will require such an extraordinary statement of facts, according to the repeated rulings of this Court, as would probably produce a different result if a new trial should be granted, and the extraordinary statement of facts relied on to produce that result must have

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been unknown to the defendant, or his counsel, at the time of the first motion, and could not have been ascertained by them in the exercise of proper diligence for that purpose. If the extraordinary facts now relied on for this second new trial *were* unknown to the defendant and his counsel at the time the first motion for a new trial was made, it is quite apparent they could have ascertained them by the exercise of proper diligence for that purpose; but it is not shown that his counsel did not know the facts at that time. Besides, it is not by any means probable that if a new trial should be granted, the extraordinary facts relied on would or ought to produce a different result as to the verdict. The *certainty* of punishment of those who violate the criminal laws of the State is the only preventive of crime.

In our judgment, there are no extraordinary facts contained in the defendant's second motion for a new trial which, under the laws of this State applicable thereto, entitle him to another hearing, either in the Court below or before this Court.

The application for *mandamus* is therefore refused.

POINDEXTER CHERRY, plaintiff in error, vs. WILLIAM A. RAWSON, defendant in error.

1. Where a plea was filed to a note executed in October, 1861, and due January 1st, 1863, setting up what the consideration of the note was, its value at the time of purchase, and since, and that it was worth less than the amount specified in the note, and claimed that it should be scaled under the Ordinance of 1865:

Held, That the defendant should have been allowed to go to the jury on the plea, and to have proven what equities he was entitled to under said Ordinance.

2. A plea, although filed in 1866, to a suit on a contract, when the case was not tried until 1872, should have been sworn to before the trial, and a demurrer to the plea, on the ground that it was not sworn to, was properly sustained.

Scaling Ordinance. Pleading. Practice in the Superior Court. Before Judge HARRELL. Stewart Superior Court. October Term, 1872.

Rawson brought complaint against Cherry, as security, upon the following note :

"\$2,336 29. LUMPKIN, October 19th, 1861.

"On the first day of January, 1863, I promise to pay W. A. Rawson, or bearer, twenty-three hundred and thirty-six dollars and twenty-nine cents, for value received, to be paid in good average lint cotton, at the warehouse in Florence, in good order, by the first day of February, 1863, and if not so delivered, and cotton sells at higher rates after that time in Florence, then I promise to pay said Rawson the difference over ten cents.

(Signed)

"J. J. DAY,

"P. CHERRY, security."

The defendant pleaded as follows: 1st. The general issue. 2d. That the note was given in part payment for certain lands, the entire price of which was \$3,800 00, \$1,500 00 having been paid in cash, which was more than the land was at any time worth; that he desires the debt scaled under the Ordinance of 1865.

Upon demurrer to the second plea, it was stricken, and defendant excepted.

There was another plea filed in 1866, which was not sworn to, defendant contending that, having been filed before, it did not come under the operation of the provisions of the Constitution of 1868. Upon demurrer, it was also stricken, and defendant excepted.

The case went to the jury upon the plea of the general issue. A verdict was returned for the full amount of the note sued on, with interest, except for the four years covered by the war.

The defendant assigns error upon each of the aforesaid grounds of exception.

E. H. BEALL; M. J. CRAWFORD, for plaintiff in error.

Cherry vs. Rawson.

J. L. WIMBERLY ; BLANDFORD & CRAWFORD, for defendant.

TRIPPE, Judge.

1. The Scaling Ordinance of 1865 provides, "that all contracts made between the first of June, 1861, and the first of June, 1865, whether expressed in writing or implied, or existing in parol and not yet executed, shall receive an equitable construction, and either party, in any suit for the enforcement of any such contract, may, upon the trial, give in evidence the consideration and the value thereof at any time; and the intention of the parties as to the particular currency in which payment was to be made, and the value of such currency at any time, and the verdict and judgment rendered shall be on principles of equity." By the terms of the Ordinance, the defendant was entitled to go to the jury with his plea. He may not be entitled to claim a reduction of the amount he promised to pay, from the simple fact that the agreement was to pay an amount more than the land was worth. But the Ordinance says that in any suit for the enforcement of any contract made within the period specified, either party may give in evidence the consideration and its value, and the intention of the parties as to the currency in which payment was to be made, and its value. The plea states the consideration and its value, and asks that a scaling be made under the Ordinance. In the opinion of some of the Court, the date of the note furnishes a presumption as to the intention of the parties in regard to the currency in which payment was to be made. However, we do not so decide, but hold that, under the plea and the terms of the contract, executed at the time it was, and payable at the date therein fixed, the defendant should have been permitted to have gone to the jury with such rights as he could have established under the provisions of the Ordinance.

2. Although the other plea of defendant was filed in 1866, before such pleas were required to be under oath, yet we think

that the proper construction of the Constitution of 1868, on that point, now makes it necessary that they should be sworn to before trial, and they are subject to be stricken if not sworn to. No harm can result to a defendant under such a construction, and all the benefit intended to be obtained by the change of the law will be secured.

Judgment reversed.

JOHN A. GRIFFITH, for use, etc., plaintiff in error, vs. CAN-
NON H. SHIPP, defendant in error.

1. Where an execution has been levied upon the property of the defendant, it was error in the Court to dismiss the levy on the ground that no affidavit had been filed as to the payment of taxes as required by the Relief Act of October 18th, 1870.
2. According to the provisions of the §264th section of the Code, in order to traverse the entry of service by the sheriff, the defendant should show that he had done so at the first term after notice of such entry is had by him, or should show that he had no notice of the pendency of the suit against him prior to the rendition of the judgment.

Relief Act of 1870. Illegality. Service. Before Judge
RICE. Walton Superior Court. February Term, 1873.

For the facts of this case, see the decision.

CLARK & PACE; WALKER & McDANIEL, for plaintiff in
error.

J. W. ARNOLD, by brief, for defendant.

WARNER, Chief Justice.

This case came before the Court below on an issue formed upon an affidavit of illegality to an execution which had been levied on the defendant's property, on the ground that he had not been served with the original process in the case in which the judgment and execution was obtained.

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It appears on the face of the record that the defendant was served by the sheriff. The defendant proposed to prove by the sheriff, and by himself, that he had not been served, and the Court admitted the evidence, but there was no judgment rendered by the Court upon that issue. The Court, however, dismissed the plaintiff's levy on the property of defendant on the ground that no affidavit had been filed as to the payment of taxes, as required by the Act of 1870, and that was the only judgment rendered by the Court in the case, to which judgment the plaintiff excepted. The dismissal of the plaintiff's levy on the property of defendant because there was no affidavit of the payment of taxes, as required by the Act of 1870, was error. It would seem that according to the provisions of the 3264th section of the Code, that in order to traverse the entry of service by the sheriff, that the defendant should show that he has done so at the first term after notice of such entry is had by him, or should show that he had no notice of the pendency of the suit against him prior to the rendition of the judgment.

Let the judgment of the Court below be reversed.

THE BOARD OF PUBLIC EDUCATION FOR THE CITY OF AMERICUS *et al.*, plaintiffs in error, *vs.* WILLIAM W. BARLOW *et al.*, defendants in error.

1. The Legislature, under the constitutional requisition to provide a thorough system of general education, may grant the power to county authorities or municipal corporations to levy a tax in aid of such system within their several territorial limits.
2. A board of education may be appointed by the Legislature within such limits, with power and authority to use and appropriate the school funds thus raised in connection with what may be derived from the general fund provided by the State, and to superintend and control the schools that may thereby be established, the same being under such supervision of the State School Commissioner as by law may be provided. The fact that such board may be created a body corporate in the Act appointing it, does not affect its right to exercise the authority given to it as a board of education.

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3. The 18th section of the Act of February 22, 1873, entitled "An Act to amend and revise the several Acts granting corporate authority to the city of Americus, and to establish and consolidate the same, and for other purposes therein named," is inconsistent with the third section of the Act of February 13th, 1873, entitled "An Act to establish a permanent board of education for the city of Americus, and to incorporate the same, and for other purposes," in so far as the latter Act provides for levying a tax, and to that extent said third section is repealed.
4. All of said Act, except that part thereof creating the local Board of Education, and giving it authority to establish, and regulate, and superintend, the public schools in said city, and to receive the proportionate part of the general State fund coming to said schools, is void, because said other portions of said Act refer to a subject matter different, not only from what is contained in the title, but from the other part of the same Act, to-wit: it grants power to the Mayor and City Council to levy a tax and issue bonds, and exempts the city from county taxation for public schools, and is obnoxious to that extent to that provision of the Constitution which says, "nor shall any Act or Ordinance pass which refers to more than one subject matter, or contains matter different from what it contains in the title thereof."
5. The Board of Education created by said Act of 18th of February, 1873, has no authority of law to require the Mayor and City Council of Americus to levy and collect a tax as is provided by said Act. Nor can said Mayor and Council levy and collect a tax as a public school fund, except by authority of the 18th section of the Act of 22d of February, 1873, which tax, if collected, may, by virtue of said section, be used at the discretion of the Mayor and City Council for the purpose for which it was levied.

Constitutional law. Laws. Education. Taxes. Before Judge HILL. Sumter County. At Chambers. June 28th, 1873.

William Barlow and other tax payers of the city of Americus filed their bill against the Board of Public Education for the City of Americus and the Mayor and City Council of said city, making substantially the following case:

On February 13th, 1873, James M. Clark, the present Judge of the Superior Courts of the Southwestern Circuit, embracing the county of Sumter, Hiram L. French, the Mayor of said city of Americus, and others, were constituted by an Act of the General Assembly of the State of Georgia a per-

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manent Board of Public Education for said city. By the provisions of said Act, said board, or a majority of them, were fully authorized to devise, establish and alter, from time to time, a plan and system of education for the children in said city, to superintend the same, to provide school houses, etc., and to make by-laws, rules and regulations, etc., for their own government. By the 3d section of said Act, full power and authority was granted to them to require the Mayor and City Council of Americus to levy a tax of one per cent. or less, upon all the taxable property of said city. Said Act pretended further to vest in said board, to an unlimited extent, the right to raise money by issuing bonds, or in any other manner except by direct taxation. By the provisions aforesaid, the Mayor and City Council are left without discretion in the levying of said taxes, or in raising the amount of funds which may be required, but are compelled to levy and collect the tax, or to negotiate the bonds, as may be required of them by the said board of education. The board have fully organized, and propose to levy a tax of one per cent. upon the taxable property of said city, and to require the collection of the same by the Mayor and City Council, and otherwise, by negotiating bonds and using the credit of said city, to raise a sufficient sum of money to build the school houses and to commence operations under said Act.

Complainants charge that said board have no authority under the Constitution of the State to make said assessment and to require said money from the tax payers, nor have the Mayor and City Council any right to collect the same for any such purpose. The Constitution protects the property of the citizen from all taxation for educational purposes, except to provide a system of general education embracing the whole State; nor can property be taxed for such purpose except upon the inadequacy of the special appropriations, and in that case the General Assembly alone can levy a general tax. The State cannot levy a general tax to support a common school system, until it shall appear that the poll tax, the specific tax on shows and exhibitions, and on the sale of spir-

ituous liquors, are insufficient for the purpose; nor can the General Assembly delegate this power to a corporation, nor to school commissioners, the same being reserved alone to the Legislature, as above stated.

If this tax is allowed, complainants will be double taxed, for they will be compelled also to contribute to the support of the common school system of the State.

Prayer, that the Board of Public Education be restrained by the writ of injunction from proceeding any further in requiring the Mayor and City Council to raise money for the purposes aforesaid, by taxation or otherwise, until the further order of the Court. That the writ of prohibition may issue directed to the Mayor and City Council of Americus, prohibiting them, upon any requisition of said Board of Public Education, from negotiating the bonds of said city, or from otherwise raising any money on said school enterprise, or from levying a tax on the property of complainants. That the writ of subpoena may issue, etc.

The defendants, the Board of Public Education, and the Mayor and City Council of Americus, filed a joint answer in which they admitted most of the allegations in the bill. They denied that complainants had no notice of the contemplated passage of said Act, and showed that a public meeting had been called through a newspaper published in said city of the friends of education, and that, after a considerable debate at such meeting, a committee had been appointed to memorialize the General Assembly upon the subject of a free school system in said city, and that the Act complained of was the result of such action. They further showed that the proceedings of said meeting were duly published, and charged that the complainants must have had notice thereof.

The Board of Public Education admit that they have organized, but deny that they have ever proposed or threatened to levy a tax of one per cent. upon the taxable property of said city, and require the collection of the same by said Mayor and City Council, or that they have ever had before them the necessity or propriety of otherwise raising sums of money suf-

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ficient to build the school houses, and to commence operations under the said Act. They further allege that, before any notice of the application for injunction, they passed a resolution requiring the Mayor and City Council to levy a tax of one-half of one per cent. upon the taxable property of said city, for the purpose of carrying on said schools. They do not now contemplate building school houses, but deem it best to rent such buildings as are suitable to the establishment of the public graded schools. They believe that such tax, together with such amounts as will be received from the State and the Peabody fund, will be sufficient to sustain the necessary schools for the present.

Both defendants refer to said Act as authority for all their acts in the past and contemplated action in the future.

The Honorable James M. Clark, the Chancellor of the Circuit embracing Sumter county, being a member of the Board of Public Education for the city of Americus, the application for the writs of injunction and prohibition, after due notice, came on to be heard before Chancellor Hill, of the Macon Circuit, on June 28th, 1873. He ordered that the writs of injunction and prohibition both issue, as prayed for. To this ruling, the defendants excepted.

C. T. GOODE; N. A. SMITH, for plaintiffs in error.

W. A. HAWKINS, for defendants.

TRIPPE, Judge.

1. The Constitution of the State declares that "the General Assembly * * * shall provide a thorough system of general education, to be forever free to all children of the State, the expense of which shall be provided for by taxation, or otherwise:" Article VI. paragraph 1. The third paragraph of the same Article, after setting apart certain taxes and funds therein specified for the support of common schools, provides further: "And if the provision herein made shall at any time prove insufficient, the General Assembly shall have power to

levy such general tax upon the property of the State as may be necessary for the support of said school system." The 27th and 28th paragraphs of Article I. are as follows: "The power of taxation over the whole State shall be exercised by the General Assembly only to raise revenue for the support of government, to pay the public debt, to provide a general school fund, for common defense, and for public improvement; and taxation on property shall be *ad valorem* only, and uniform on all species of property taxed. The General Assembly may grant the power of taxation to the county authorities and municipal corporations, to be exercised within their several territorial limits." The argument against the power of the Legislature to confer authority on counties and municipal corporations to levy taxes for free school purposes is about this: That the purposes for which the local authorities can be authorized to tax, cannot go beyond those for which the Legislature is, by the Constitution, empowered to levy taxes; that, as the General Assembly has the power of taxation to support the government, to pay the public debt, and for public improvements, so they may grant the power to local authorities to levy taxes for the support of the local government, to pay its debt, and for its public improvements; but that the other two objects for which the power of taxation is given to the General Assembly, to-wit: to provide a general school fund and for common defense, do not in any way appertain to the duties of the local governments. Granting that the measure of the power which may be conferred on the local governments, as generally stated above, is correct, the conclusion is not logical, nor does it follow from any rule given for the construction of statutes or the Constitution. The real point in it might be well made to the framers of a Constitution, or to the law-giver whilst enacting the statute. It may be a question of policy whether such power should be conferred on the General Assembly; or, if conferred, whether it should be exercised by granting it to the county or municipal governments. The power of taxation in the Legislature to provide a general school fund, is not for a purpose of a general or State charac-

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ter any more than the other three which have been specified, to-wit: to support the government, to pay the public debt, and for public improvements. They mean the government, the public debt, and public improvements of the State. If, from those two provisions in the Constitution, it be conceded, and no one denies it, that the power of taxation can be granted to local governments for such purposes as supporting themselves, paying their debts and making public improvements, the same rule of construction could not inhibit the grant to tax themselves for their public schools, especially when that would be in aid of the declared policy of the State, as expressed in its organic law.

2. We can see no reason why a board of education may not be appointed by the Legislature within the limits of the local government, with power to use and appropriate the school funds thus raised, in connection with what may be derived from the general fund provided by the State, and with the further power to superintend and control the schools thus established. Such a board would be but agents of the State, and subject to its control, at least so far as what may be received from the State school fund. The fact that such a board may be created a body corporate in the Act appointing it, does not affect its right to exercise the authority given to it as a board of education.

3. The 18th section of the Act of February 22d, 1873, entitled "An Act to amend and revise the several Acts granting corporate authority to the city of Americus," etc., is inconsistent with the 3d section of the Act of February 13th, 1873, entitled "An Act to establish a permanent Board of Education for the city of Americus," etc., in so far as the latter Act provides for levying a tax. The 18th section of the first mentioned Act is, "that said Mayor and City Council, or a majority of them, shall have full power and authority to levy and collect a tax on all real or personal property within said city of one per cent., as a public school fund, to be used at their discretion." The 3d section of the last recited Act provides "that the Mayor and City Council of Americus shall

have power and authority to impose and collect the requisite taxes, and are hereby authorized to issue and negotiate the requisite bonds, or otherwise engage the credit and apply the services of the city to raise such revenue for the establishment and maintenance of such public schools as may be established by said Board of Education, *and as may be required of them for said purpose.* If this last section was intended, as it seems to have been, and as is claimed for it, to give authority to the Board of Education to order the city authorities to levy and collect a tax to be appropriated as they might direct, then the 18th section of the Act of February 22d is in conflict with it. That section gives the power to the Mayor and Council to levy and collect a tax and use it at their discretion. There is no restriction on their authority, no subjection of them to the control of any other tribunal. The only limitations are, that the tax must be for a public school fund, and must not exceed one per cent. The two Acts certainly were not intended the one to authorize the Mayor and Council to levy and use one tax at their discretion, and the other that they should be compelled to levy another tax at the command of the Board of Education, and that the latter tax should be subject to its control and direction. The Act of February 22d gives the power to the Mayor and Council untrammelled by any superior authority over them, and having been passed after the other, abrogates the former to the extent of such conflict.

4. But the 3d section, and some other provisions of the Act of February 13th, are obnoxious to a still more serious objection. Paragraph 5, section 4 of the third Article of the Constitution declares: "Nor shall any law or ordinance pass which refers to more than one subject matter, or contains matter different from what is expressed in the title thereof." The title is, "An Act to establish a permanent Board of Education for the city of Americus and to incorporate the same, and for other purposes." One subject matter, and the great object of the Act, is to create a local board of education for the city and to give it authority to establish, regulate and su-

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perintend the public schools, and to receive the portion of the general State fund coming to said schools. Another subject matter is the grant of power to the Mayor and Council of the city to levy taxes and issue city bonds, and further, the exemption of the citizens of the city from county taxation for public schools.

In *Prothro & Kendall et al., vs. Orr*, 12 Georgia 36, it was held that the 5th section of the Act of 1809, entitled "An Act to authorize the clerks of the Courts of Ordinary, sheriffs, coroners and surveyors to hold their office during the intervention between the election and commissioning of their successors, and to regulate the transfer of papers and money," was variant from the title and void. The 5th section made it the duty of the officers elected to apply to the Executive for their commissions within twenty days after their election.

In *The Justices, etc., vs. Hunt et al.*, 29 Georgia, 158, STEPHENS, Judge, makes a strong argument illustrating this point. The title of the Act was "An Act to appoint county treasurers and define their duties." A section in the Act gave the Justices of the Inferior Court power to issue executions against defaulting treasurers. Though the judgment of the Court was put on another ground, the Judge pronouncing the opinion gave it as his decided conviction that the section referred to was unconstitutional, because it was a total departure from the caption of the Act. He said, "to issue an execution against them (the treasurers) is a totally different thing from appointing them or defining their duties." With equal force may it be said that the power given to the Mayor and Council of Americus to levy a tax and issue bonds, and the exemption of the citizens of the city from county taxation, are totally different things from creating an independent Board of Education, and defining its powers as such a board. So in *Sanders vs. The Town Commissioners of Butler*, 30 Georgia, 679, it was decided that a statute, under the title of "An Act to regulate the rates of tavern licenses in this State," could not, in the body of the Act, confer a power to grant the license, for it would be variant from the title.

We are aware of what has been held to be the effect of the words, "and for other purposes," in the title of an Act: *Martin vs Broach*, 6 Georgia, 21, and as recognized in the case in 12 Georgia, *supra*. But it will be recollected that those cases were decided before the Constitution of 1868 went into operation, and also before the adoption of the Constitution of 1861. The Constitution of 1861, for the first time, contained the provision as it now stands in the present Constitution. The clause in the old Constitution, under which these decisions were made, simply prohibited any Act from containing matter *different* from what is expressed in the title thereof. With the prohibition going only to that extent, it might be correctly said that when the title contained the broad words, "and for other purposes," it made itself so comprehensive as that nothing in the body of the Act could be different from the title. And, accordingly, it was held, and so practiced by the Legislature, that those words gave an unlimited capacity to the body of the Act.

But the evil of such a practice was seen, although it has been so often said that those words were sufficient to call the attention of members of the Legislature, on the passage of bills, to the necessity of looking to all the enacting clauses, as the title gave notice that the object of the Act was not fully given in the caption. To remedy what was believed to be pernicious, even with those words of notice, the constitutional prohibition has been enlarged so as to inhibit the passing of "any law *which refers to more than one subject matter*, or contains matter different from what is expressed in the title thereof." Does not this close the door against any force or effect being given to the words, "for other purposes?" If those words were once necessary to permit the introduction of matter in the bill, different from what was embraced in the other portion of the title, would not that very thing show now that the bill would thereby become obnoxious to the other clause prohibiting more than one subject matter? The necessity of such words, under the provision as it formerly stood, to prevent the bill from containing matter different from the

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title, could only arise because such matter is something different from what had already been expressed. It shows that something more than one subject matter is intended. If so, although it was allowed under the clause as it was formerly, it cannot now be done. The expression of both or many matters in the title, whereby the bill might be relieved from any conflict with the last branch of the clause, would plainly exhibit its direct antagonism to the first.

5. Our conclusion is, that the Board of Education, created by the Act of February 13th, has no authority of law to require the Mayor and City Council of Americus to levy and collect a tax, as is provided by said Act. Nor can said Mayor and Council exercise such power for school purposes except by virtue of the Act of February 22d. If such tax be collected, it may be used by the Mayor and Council, at their discretion, for the purposes for which it was levied.

The judgment of the Court below is affirmed, with modification accordingly.

JAMES P. SIMMONS, plaintiff in error, vs. ANDREW J. SHAFFER, defendant in error.

1. Where, for a valuable consideration, the defendant covenanted to pay to the plaintiff whatever amount he might recover in a suit then pending against R., on a note dated in March, 1862, and due twelve months after date, for \$3,500 00, besides interest, and at the September term of the Court, 1866, a judgment was rendered in said suit for \$1,990 34 with interest and costs, and at the March term, 1871, under the provisions of the Relief Act of 1868, said judgment was reduced by the verdict of a jury to the sum of \$700 00, upon which last verdict no judgment appears to have been entered, it was error in the Court to direct the jury to find for the plaintiff the amount last aforesaid.
2. The legal presumption, from the absence of a judgment on the second verdict, is that it was arrested, or a new trial granted or some other valid legal reason existed why none was rendered.
3. This Court can only consider such evidence as was offered by the parties in the Court below and the legal effect of the same.

Covenant. Verdict. Judgment. Presumption. Evidence. Practice in the Supreme Court. Before Judge RICE. Gwinnett Superior Court. March Term, 1873.

For the facts of this case, see the decision.

JAMES P. SIMMONS, for plaintiff in error.

J. N. GLENN; CLARK & PACE, for defendant.

WARNER, Chief Justice.

This was an action of covenant brought by the plaintiff against the defendant, to recover the amount of a judgment against one Russell, which the defendant covenanted he would pay in consideration that a certain injunction then pending against him at the suit of the plaintiff should be dissolved, that is to say, the defendant covenanted that he would pay to the plaintiff whatever amount might be finally recovered against said Russell in a suit then pending on the common law side of the Court in favor of the plaintiff against said Russell *et al.*, on a note dated in March, 1862, due twelve months after date, for the sum of \$3,500 00, besides interest. It appears from the record before us, that on a trial had on the note at the September term of the Court in 1866, the jury scaled or reduced the plaintiff's debt against Russell, and found a verdict in favor of the plaintiff for only the sum of \$1,999 38, with interest and cost, upon which verdict a judgment was regularly entered and signed. Subsequently, at the March term, 1871, of the Court, the defendant made a motion to have the judgment rendered in 1866 opened and reduced, under the Relief Act, and upon the trial of that motion the jury found a verdict reducing the plaintiff's judgment against Russell to the sum of \$700 00. Upon this last verdict no judgment appears to have been entered. Whether the judgment was arrested, or whether there was a motion made and pending for a new trial, does not affirmatively appear on the face of the record offered in evidence by the plaintiff.

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The Court held and directed that a verdict should be rendered in favor of the plaintiff against the defendant for only the sum of \$700 00, the amount found by the last verdict, instead of the sum of \$1,999 38, the amount of the judgment. It was contended on the argument that inasmuch as it appears from other portions of the record (not offered in evidence by the plaintiff at the trial,) that there is now a motion for a new trial pending in the Court below from the finding of the \$700 00 verdict, that this Court should consider that fact in this motion for a new trial in the Court below, which was overruled there, and which is assigned for error here. We can only consider such evidence as was offered by the plaintiff in the Court below, and the legal effect of that evidence. The defendant introduced no evidence at the trial. What is the legal effect of the evidence contained in the record offered by the plaintiff? That record shows a verdict and judgment thereon against Russell in favor of the plaintiff for the sum of \$1,999 38; that record also shows a verdict of the jury reducing the amount of that judgment to \$700 00, but there is no judgment of the Court upon that verdict, and the legal presumption is that the judgment was arrested, or a new trial was granted, or some other valid legal reason existed why a judgment was not rendered upon that verdict, and especially is this so under the provisions of the second section of the Relief Act of 1868, which declares that the judgment rendered under the provisions of that Act shall supersede the prior judgment. There was no judgment of the Court contained in the record offered in evidence by the plaintiff which superseded the judgment obtained by the plaintiff against Russell, in 1866, for the sum of \$1,999 38, and the Court erred in holding and deciding that the judgment obtained in 1866 had been reduced or superseded according to the evidence before it.

Let the judgment of the Court below be reversed.

NANCY DORSEY, plaintiff in error, vs. IRBY D. SIMMONS *et al.*, defendants in error.

1. A legatee or the purchaser of a distributive share in an estate may, in equity, set off the same against a judgment in favor of the executor against such legatee or owner of such share, where no special reason exists for the collection of the judgment by the executor.
2. The claim set up by the executor in this case for counsel fees and cost paid under the circumstances proven, and when there was enough money in hand at the time (1863) to pay the same, and which was afterwards funded by the executor in Confederate bonds and lost, is not a sufficient reason.
3. One of the shares in the estate, proposed to be set off, or allowed against the judgments, belongs to complainant by survivorship, and she is not affected by a previous bill filed by her husband (now deceased) for the same purpose as this, and dismissed by him. And though the judgments sought to be enjoined were obtained against her husband, yet as they are levied on property belonging to complainant and would, if collected, be assets to which her legacy would attach, she has not lost her right to be heard.
4. The facts shown at the hearing for an injunction, entitle complainant to have the collection of the judgments stayed until her rights can be determined at the final trial.

Injunction. Administrators and executors. Legacy. Judgment. Before Judge HALL. Spalding County. At Chambers. August 23d, 1873.

Nancy Dorsey filed her bill against Irby D. Simmons, and Robert S. Connell, sheriff, making substantially the following case :

She is the daughter of Polly Johnson, who was daughter of Charles Simmons, late of Oglethorpe county, who departed this life in the year 1847, testate, bequeathing all of his property to his wife, and at her death to be equally divided among his five children. Abram Simmons qualified as executor in December, 1847, and took possession of all the estate of said deceased. Polly Johnson, mother of complainant, died in the year 1856, and Nancy Simmons, life tenant under the will, died in the fall of 1862. Abram Simmons, executor, then sold the land and perishable property of his deceased

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father for about \$1,700 00, and there being no debts, and but few expenses, at least \$1,500 00 remained in his hands for distribution among the five legatees, one-fifth of which, \$300, became the absolute property of the six surviving children of Polly Johnson.

Abram Simmons, the executor, managed and controlled the large estate of Charles Simmons, from 1849 to 1862, during the widowhood of the life tenant, with no expenses except the maintenance of a decrepid old lady. He reported no income, nor the sale of the lands. In December, 1862, he applied to the Ordinary of Oglethorpe county and obtained the appointment of three commissioners to appraise and divide the negroes of said estate in kind. The division was made in January, 1863, and four negroes were set apart for the heirs of Polly Johnson. They were taken possession of by Abram Simmons, who was appointed as trustee for Polly Johnson in the will of said Charles Simmons. This distribution was final and conclusive, and the negroes set apart for each of the other legatees were delivered to them; but Abram Simmons hired out the negroes set apart for the heirs of Polly Johnson in January, 1863, when John S. Dorsey, husband of complainant, William Johnson, her brother, and Joshua Moore, who married the sister of complainant, hired said four negroes, John S. Dorsey taking two, and giving his note, payable to said Abram as executor, for \$13 00, with William Johnson as security, said William Johnson taking one negro and giving his note, with John S. Dorsey as security, for \$35 00; Joshua Moore taking one negro and giving his note, with John S. Dorsey as security, for \$40 00. Said Johnson, in his own right, and said Dorsey and Moore, in right of their wives, were each entitled to one-seventh of the legacy going to Polly Johnson, which was, including cash from sale of land and personal property, and the hire of negroes, represented by said notes, about \$400 00, or \$57 00 to each, which should have been paid to them at that time, but said Abram Simmons fraudulently refused and neglected to settle with them.

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Abram Simmons died in 1864, and Irby D. Simmons, of Spalding county, qualified as his administrator and took possession of said notes, and having enmity against Dorsey and his sons, did, to annoy, etc., in April, 1866, commence suit on all of said notes against said Dorsey only, in the Justice Court of the one thousand and sixty-ninth district, Spalding county, when Dorsey, Moore and Johnson filed a bill and obtained an injunction restraining said suits. Said Irby D. answered said bill, admitted all the allegations, but set up some pretext in avoidance. Said bill continued in Court until February, 1868, when Dorsey was, by reason of his feeble health and old age, incapable of giving it attention, and it was dismissed, and soon thereafter said Irby D. procured judgments to be entered on said notes, making no effort whatever to obtain judgments against said Moore and Johnson, although principals, and residents of Fayette and Coweta counties, and able to pay the same, thus increasing the risk of Dorsey as security. There has been no representation on the estate of Charles Simmons since the death of said Abram, and no representation has ever been obtained on the estate of Polly Johnson. Irby D. Simmons has no right, title or interest in either of said notes or the judgments obtained thereon, no right to sue or collect the same; still he is, to the great injury of complainant, fraudulently seeking to sell certain lands conveyed to her as a homestead in lieu of dower by her husband in 1866, before any judgment had been obtained against him, having had said *fi. fas.* levied on ninety-eight acres of her land. John S. Dorsey died in June, 1869, leaving some personal property, having deeded to complainant three hundred acres of land in 1866 in lieu of dower, said lands levied on being the most valuable portion thereof. One Heronton has the whole of said lands levied on to satisfy a judgment against said Dorsey, obtained November, 1866, for about \$900 00. Peter Hindsman is claiming payment of a large debt against said Dorsey, which will destroy her life estate under said deed, and if allowed to sell, will deprive her of dower.

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Complainant charges that defendant is using the patrimony of her ancestors to deprive her of her home in her old age, and prays that he may be perpetually enjoined from enforcing the collection of said *fi. fas.*, that they may be declared null and void; also, that commissioners may be appointed to lay off and assign her dower and a sufficiency of household and kitchen furniture; that said Simmons may account to her for her distributive share of her mother's legacy which went into the hands of said Abram Simmons, and that the portions of Joshua Moore, William Johnson, and the shares bought by said Dorsey, and also the share bought by said Moore, or so much thereof as may be necessary to satisfy said *fi. fas.*, may be applied to the extinguishment of the same; that the writ of subpœna may issue.

The affidavit of Joshua Moore, in support of the bill, was, in substance, as follows: Has resided in Coweta county for forty-six years; is now, and has been all that time, fully able and willing to pay his debts, and if Irby D. Simmons had obtained judgment on the \$40 00 note, property could have been found of his to pay said debt; thirty-four years ago he married Elizabeth, daughter of Polly Johnson, and granddaughter of Charles Simmons, who died in 1847; Abram Simmons qualified as his executor; said Abram resided on the farm with the widow for several years and superintended said farm, which consisted of about four hundred acres, two hundred of which was cleared; he, as executor, worked from eight to twenty good hands, made large crops of corn and cotton; the cotton was sold and most of the proceeds were converted to his own use; did not account to legatees for any profits on the farm. He furnished the widow with a scanty living, as he knows from having visited her; he dealt out provisions to said widow in small allowances, measuring it as if for servants. During the time said Abram controlled said estate, four, and sometimes six, valuable negro men were hired out annually for \$150 00 to \$200 00, they being mechanics and railroad hands; he never accounted for any portion of said hire in his returns, and deponent is well satisfied, from his

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own observation, that very little, if any, was paid over to or for the widow, and, after inquiry, he could not ascertain that any of this money had been applied to the payment of debts.

Deponent and John S. Dorsey were present at the distribution of the slaves of said estate, and he knows, of his own knowledge, that Abram Simmons claimed to represent the children of Polly Johnson, as trustee, appointed in the will. Only deponent, Dorsey, and William Johnson, of Polly Johnson's heirs, were present. Polly Johnson died two or three years before her mother, leaving living nine children—four, to-wit: Solomon, Luke, Isabell and Travis died before Nancy Simmons, without any wife, husband or children, leaving only five heirs of Polly Johnson to participate in said legacy, to-wit: Nancy Dorsey, Elizabeth Moore, Charles and William Johnson, and John Johnson, who has since died, leaving two children, who are also dead as deponent is informed. John S. Dorsey bought and paid for the share of Charles Johnson in this estate, and deponent bought and paid William Johnson for his interest in said estate, and deponent believes that he and Mrs. Nancy Dorsey, by inheritance and purchase, are entitled to all of the estate of Polly Johnson. Deponent bought the land of Charles Simmons' estate when sold by said Abram, in February, 1863, at the price of \$950,00, and paid for it in cash. The corn, cotton and other produce of the farm for 1862, was sold by said Abram, and the proceeds never accounted for, so far as he can learn. At the division of the negroes some \$30,00 was assessed against the lot assigned to the heirs of Polly Johnson, which sum was paid by deponent and Dorsey, in cash. Deponent, Dorsey and William Johnson urged said Abram to pay to them their shares of said estate at the time the negroes were divided, which he refused to do. Deponent, having bought the interest of William Johnson, took possession of the negro hired by him and carried him and the one hired by deponent to Coweta county. No effort was ever made to recover said negroes from deponent, and no demand was ever made for payment of notes given for hire, and if it had been demanded, payment would have been refused,

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because one-fifth of said negroes belong to him in right of his wife, and he bought another fifth from William Johnson, and there was an agreement by which deponent was to keep these two negroes and settle with John Johnson's heirs, and Dorsey was to keep his two negroes and settle with Charles Johnson, which he did by paying him for his entire share. Deponent further states from his best information acquired by inquiry at the time of distribution, no payment was made to any of the heirs of Polly Johnson. Deponent, Dorsey, and William Johnson also insisted on being allowed to take negroes and settle with other heirs of Polly Johnson, and offered to give receipts or bonds to save said Abram harmless, still he refused, but proceeded to hire out said negroes, when deponent hired one at \$40,00, William Johnson one at \$35,00, Dorsey hired two, both small and young, for about \$12,00 or \$15,00. Notes were given bearing date in January, 1863, for respective amounts, payable to Abram Simmons, executor, Dorsey signing as security for deponent and Johnson, and Johnson signing as security for Dorsey. Dorsey brought his two negroes to Spalding, and some time in the fall of 1863 said Abram Simmons proceeded by possessory warrant to obtain possession of said negroes, but the Court held that Dorsey was entitled to the same. Deponent further states from his best information acquired by strict inquiry at time of distribution, and from his own knowledge, that the heirs of Polly Johnson would, on a full accounting for all the assets which went into the hands of said Abram, be entitled to some \$2,000 00 or \$3,500 00, besides the negroes. Deponent, Dorsey, and William Johnson demanded their shares in the same, and could not get them. Deponent does not believe that any of the heirs of Polly Johnson ever received anything from said Abram. Never heard of any of the heirs of Polly Johnson being notified to come and get their portion; he never had any such notice. Neither deponent, Dorsey, or William Johnson could get any money from said Abram, although they demanded it. Deponent made every possible effort to obtain the portion he owned at the time the land was sold,

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and said Abram peremptorily refused to pay. Never has been sued on his note, and never knew of the bill filed in his name in Spalding; if he had been fully informed of its tenor he would have pushed forward with all energy, and sought in that to have obtained a judgment for a large balance due him after deducting said note.

The defendant demurred, pleaded and answered, as follows :

1st. Demurs because all the equities in the bill have been passed on and adjudged, as shown by bill, and complainant has had her day in Court and should have objected to the claim going into judgment.

2d. No equity in the bill.

Pleads that all the matters in complainant's bill have been adjudicated, in this, that suit was brought on the notes, and John S. Dorsey filed a bill to enjoin the same, and after said bill had been pending for a time, it was dismissed, and subsequently judgment was rendered on notes in a Justice's Court, after full notice, which judgments are pleaded in bar to any right claimed by complainant in her bill.

The answer admits that complainant is the daughter of Polly Johnson, that Polly Johnson died before Nanty Simmons, and after the death of Charles Simmons ; that Abram Simmons qualified as executor of Charles Simmons in 1847, and took possession of his estate, but did not sell the same until after the death of Nancy Simmons, who had a life estate therein. Thinks the land sold only for \$800 00, sale of perishable property amounted to \$600 00, all of which was received in Confederate money and divided among the legatees, except the heirs of Polly Johnson. Is informed that the executor notified the heirs of Polly Johnson, of whom Dorsey was one, to come and receive their portion, which they failed to do, and the executor, under legal advice, under the laws then of force, invested the same in Confederate securities, which discharged the executor on account of said fund. Denies that Abram Simmons managed the estate from 1849 to death of life tenant, and, on the contrary, alleges that Nancy Simmons was entitled to all the income from said estate, and

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Abram was not responsible for the same. Division of negroes took place, as alleged, in the latter part of 1862, and four negroes were set apart to the heirs of Polly Johnson and left in the hands of Abram for said heirs, as trustee appointed under the will. The negroes awarded to the other legatees were delivered to them, and the reason why the negroes were not delivered to the heirs of Polly Johnson, was that she was dead, and having had seven or eight children, some of whom were dead, and had left minor children, no one could give him receipts. He was, therefore, forced to retain them until a division could be had and proper parties qualified to act for the minors. Hired out negroes to 1st of June, 1863; hired to the persons and for the amounts set out in bill. William Johnson, and wife of Joshua Moore are children of Polly Johnson. Positively denies that complainant was entitled to one-seventh of the hire of said slaves at time of filing said bill, or that any balance was due her from the estate of Charles Simmons, deceased. Nothing was due the heirs of Polly Johnson, on the contrary, on the division of the slaves the shares set apart to Polly Johnson were required to pay back to the estate \$30 00. Said negroes were hired only until 1st of June, 1863, at which time it was expected a division could be had with the heirs of Polly Johnson. When this period expired, said Abram demanded said negroes of said Johnson, Moore and Dorsey, and they refused to deliver them up, and said Abram was forced at great expense to institute legal proceedings to recover said negroes. Said Johnson, Moore and Dorsey appropriated to their own use the whole of the hire of said slaves from 1st of January, 1863, until emancipation. Denies that said Abram fraudulently withheld the portion coming to the heirs of Polly Johnson; only delayed until proper parties could be appointed to receive the same. Abram Simmons died testate in 1864, and Irby D. qualified as his executor and took charge of the notes on Dorsey and others. They declined to pay, and he brought suit. Dorsey, Moore and Johnson filed a bill in Spalding Superior Court to enjoin said suits, and said bill was dis-

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missed at the February term, 1868, not because Dorsey was old and infirm, nor was it dismissed without the knowledge of complainant, for Dorsey was sent for and came into Court and stated that he would have no more to do with it, and the case was dismissed in open Court. Judgments were afterwards obtained on said notes, which are still open and binding. Defendant stands charged as executor of Abram with estate of Charles Simmons, deceased. Polly Johnson has no estate, having died before the life tenant, and only a life estate was to vest in her under the will, hence it went to her children. Defendant, as executor of Abram, has paid expenses of litigation in trying to get the negroes back, amounting to some \$82 00, which was incurred during the lifetime of said Abram by Cicero P. Simmons, as his agent, which this defendant has paid to said Cicero. This amount, with interest, defendant is entitled to recover on these notes. Abram Simmons was bound to account to Polly Johnson's heirs for the hire of the negroes, and defendant was bound to sue for the same, and having obtained judgment, is seeking to enforce the same for the purpose aforesaid. Knows of no deed made by Dorsey to complainant. If made, it is fraudulent and void as against this defendant. No homestead taken would be good against this defendant.

Dorsey left three hundred acres of land, and personal property worth from \$5,000 00 to \$7,000 00. Could save her dower right by giving notice of same at sale. Could have year's support by applying for same. Complainant has, since the death of her husband, sold land at from \$30 00 to \$40 00 per acre, realizing large sums of money.

Other affidavits and documentary evidence were read before the Chancellor, but being unnecessary to an understanding of the decision, are omitted.

The injunction prayed for was refused, and complainant excepted.

BOYNTON & DISMUKE, for plaintiff in error.

SPEER & STEWART, for defendants.

TRIPPE, Judge.

1. It has been more than once held by this Court that a legatee, or the purchaser of a distributive share in an estate, may, in equity, set-off the same against a judgment in favor of the representative of the estate against such legatee or owner of such share, unless some special reason exists for the collection of the judgment by the executor: *Moody vs. Ellerbe, administrator*, 36 Georgia, 666; *Carter vs. McMichad*, 20 *Ibid.*, 96; *Swift vs. Swift*, 13 *Ibid.*, 140.

2. The reason set up by the executor in this case, that in 1863 counsel fees and cost had been paid, and that he desires reimbursement for the same, we do not think sufficient, under the circumstances connected therewith. It appears that there was Confederate currency in hand at that time, more than was necessary for their payment. This currency was afterwards funded by the representative in Confederate bonds and lost, or became worthless. It would hardly be equitable for an executor, who had such funds in hand during the war, and who paid expenses accruing in 1863, to claim now, when he says that such currency became worthless in his hands, that he should be repaid with what little of good assets that may be undisposed of. It does not appear but that he made the payment with Confederate currency. The debt was contracted in 1863, and paid then. If paid in that currency, the amount he held was sufficient for the purpose, or the amount he held and funded in 1864 was sufficient to have repaid him. We think, at least, that it is proper for this matter to be inquired into.

3. The former bill filed by the husband of complainant, and which was dismissed, does not affect the right of the wife in this case. The husband has since died. The distributive share of the wife, under her grand-father's will, survives to her, and her right to assert all her equities is unaffected by the former proceedings, which were dismissed without any judgment or decree affecting the merits. The judgment sought to be enjoined, and against which the set-off is prayed, is

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against the deceased husband. It is levied on land which she holds under her husband. It seeks to take property from her which would, by its sale, become assets to which her legacy would attach. All the reasons which apply to the principle that would allow the set-off, if the judgment were against her, exist in this case. There is no difference, in reason or equity, between the one case and the other. If there appear no necessity why the debt should be collected, except to pay the money back to the one from whom it is, to all intents and purposes, collected, equity will restrain the collection: *Moody vs. Ellerby*, *supra*.

4. We, of course, do not determine what may be the facts shown at the final hearing. But what appeared on the application for the injunction entitle the complainant to have the collection of the judgments stayed until her rights can be determined at such trial.

Judgment reversed.

HENRY HUNT, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

1. Under the provisions of the Constitution, it was error in the Superior Court to limit the defendant's counsel to a definite time in his argument before the jury, over his protest that he could not do justice to his client's case within the prescribed time.
2. If the evidence contained in the record had been so decidedly strong as to have required the verdict rendered by the jury, it might not have been interfered with for the error complained of, but the evidence is conflicting as to whether the stabbing was done in self-defense; and inasmuch as the defendant was prevented by the Court from having the privilege and benefit of counsel in his defense, as contemplated by the Constitution, the judgment of the Court below is reversed.

Constitutional law. Criminal law. Attorney. Practice. New trial. Before Judge KNIGHT. Cobb Superior Court. October Adjourned Term, 1872.

For the facts of this case, see the decision.

JOHN O. GARTRELL, by LESTER & THOMSON, for plaintiff in error.

C. J. WELLBORN, Solicitor General, by Z. D. HARRISON, for the State.

WARNER, Chief Justice.

The defendant was indicted for the offense of an assault, with intent to murder. On the trial, the jury found him guilty of the lesser offense of stabbing. A motion was made for a new trial, on the several grounds set forth in the record, which was overruled, and the defendant excepted. The principal ground of error insisted on before this Court was, that the Court below limited the defendant's counsel to thirty minutes in his argument before the jury, over his protest that he could not do justice to his client's case within the limited time prescribed by the Court. It appears from the certificate of the presiding Judge that he allowed the defendant's counsel forty minutes to address the jury—that is to say, he allowed him to go ten minutes over the time prescribed at the commencement of the argument.

1. In view of the provisions of the Constitution, which declares that every person charged with an offense against the laws shall have the privilege and benefit of counsel, the Court below committed a grave error in limiting the argument of counsel, as disclosed by the record, which this Court cannot sanction.

2. If the evidence contained in the record had been so decidedly strong as to have *required* the verdict rendered by the jury, we might not have interfered with it for the error complained of, but the evidence is conflicting as to whether the stabbing was done in self-defense; and inasmuch as the defendant was prevented by the Court from having the privilege and benefit of counsel in his defense, as contemplated by the Constitution, we reverse the judgment of the Court below and order a new trial.

Let the judgment of the Court below be reversed.

JAMES A. BURKE *et al.*, plaintiffs in error, vs. FRANCIS G. WILKINS *et al.*, defendants in error.

A bill was filed by a purchaser at a sheriff's sale, under a common law *fi. fa.*, against a former purchaser of the same land at a sale by virtue of a tax *fi. fa.*, to set aside and cancel the deed made to such former purchaser. The issue thus made, and the finding thereon by the jury in favor of complainants, did not authorize the Chancellor to decree the cancellation of the deeds, both of defendants and complainants, and to direct that the land be resold under the common law *fi. fa.* If the defendant in execution, or his creditors, had any equities in the premises requiring a resale, they should have been parties to the proceedings, which could have been done on their own motion.

Judicial sale. Equity. Parties. Before Judge JOHNSON. Muscogee Superior Court. May Term, 1873.

James A. Burke, George H. Cameron, Henry L. Benning and Edmund H. Worrill filed their bill against Francis G. Wilkins, Francis G. Wilkins, as trustee for Parmela F. Wilkins and Lucy G. Wilkins, and Parmela F. Wilkins and Lucy G. Wilkins, making, substantially, the following case :

On June 26th, 1868, a tax execution for \$128 00, State and county taxes, issued against James F. Winter, which was, on July 6th, 1868, levied on lot number one hundred and ninety-six, in the city of Columbus, as the property of said Winter. On September 7th, 1869, said lot was sold under said levy to John W. Duer, as Ordinary of said county, for \$143 00, and a deed was made accordingly on the succeeding day. The property sold was worth \$3,000 00. On June 30th, 1868, an execution issued against said Winter for \$322 50, the tax due to the Mayor and Council of Columbus, which was levied on the said lot on the third of the ensuing September. The attestation clause to said *fi. fa.* was in the name of William Mills, Mayor, whilst said Mills was not the Mayor at the date it issued, or when it was levied. It was, therefore, null and void. Before and at the time of the aforesaid sale, there was an agreement between said Ordinary and said Mayor and Council, that the former should buy said property and

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hold the same until the rents and profits collected by him should prove sufficient to pay said taxes.

One Robert Matthews and the complainants, Burke and Cameron, sued out an attachment against said Winter, returnable to the March term, 1868, of the County Court of said county, which was levied on said lot. On June 28th, 1870, one F. M. Brockett, who had been made party plaintiff for the use of said Matthews, Burke & Cameron, recovered a judgment in said suit for \$2,350 40, principal, and \$449 29, interest. On March 3d, 1871, execution issued from this judgment, which was levied on the succeeding day on said lot. It was soon after agreed between said Ordinary and Henry L. Benning, attorney for the plaintiff in execution, that the property should be sold under said levy, that no claim should be interposed by the former, that the purchaser should pay the aforesaid taxes, and that said Ordinary should make to him a quit claim deed. On May 2d, 1871, said property was sold under said levy, and said complainants, Worrill and Benning, as attorneys for the plaintiff in execution, acting under said agreement, bid off the same at \$1,400 00 for the benefit of said plaintiff. On May 26th, 1871, a deed was made by the sheriff, in accordance with said sale, and though made to said complainants, yet, in fact, it was for the benefit of said plaintiff. After said last sale, complainants permitted said Ordinary to remain in possession of said lot, supposing there might be some small portion of the taxes due, and being willing that it should be paid out of the rents, but they have since ascertained that no balance was, in fact, due, and on the contrary, that he had collected some \$1,000 00 more than said taxes amounted to. On December 21st, 1871, said Duer, as Ordinary, conveyed said lot to the defendant, Francis G. Wilkins, the county treasurer of said county, as trustee for the defendants, Parmela F. and Lucy G. Wilkins, with power of sale in said Francis G. No consideration was paid for said deed. Said Francis G. being well aware of the terms and conditions on which said Ordinary held said lot, contracted to hold said property subject to the same. He had full notice of

the sale to Benning and Worrill, and of the agreement between said purchasers and said Ordinary.

Brockett never had any interest in said execution, but was a mere naked trustee. Matthews has sold his interest therein to the defendant, Worrill. The defendant, Francis G., is insolvent.

Prayer, that the defendant, Francis G., may be compelled to convey said lot to the complainants, and to deliver to them possession of the same; that he may be compelled to account for the rents thereof; that a receiver may be appointed to collect the rents and hold the same subject to the order of the Court; that the writ of subpœna may issue.

The answer of the defendants is unnecessary to an understanding of the decision.

The jury found "the issues in this case for the plaintiffs." The complainants moved for a decree as follows:

"That the plaintiffs do recover of the defendants the land mentioned in said bill, and that a writ of assistance do issue to put the plaintiffs in possession of said land."

The Court refused to allow the same, and complainants excepted.

The Court, among other things not excepted to by complainants, decreed as follows:

"That the sale, under the execution in favor of Brockett for use, etc., against James F. Winter, of said land mentioned, by the sheriff to Worrill and Benning, be set aside, and the deed made by the sheriff to said Worrill and Benning, under said sale, to said land, be delivered up and canceled; and that the sheriff do proceed with said writ of execution to seize and sell said lot of land according to the rules regulating sheriff's sales; that upon the sale thereof and the payment of the purchase money, he do make to the purchaser thereof good and sufficient titles in fee simple, and do put said purchaser in possession of the premises; that on the first day of the next term of this Court, he then and there make a full return of his proceedings in the premises."

To this portion of the decree the complainants excepted.

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The remainder, to which no exception was taken, set aside the sale by said Duer, as Ordinary, to said Wilkins, as trustee, and directed that the deed be delivered up to be canceled.

The complainants assign error upon the aforesaid grounds of exception.

HENRY L. BENNING ; M. H. BLANDFORD, for plaintiffs in error.

PEABODY & BRANNON, for defendants.

TRIPPE, Judge.

The record in this case shows a suit by Burke and others against Wilkins, individually, and as trustee for his wife and children, for the purpose of vacating defendant's deed to a certain lot in the city of Columbus, to compel him to convey the same to complainants, and to deliver possession to them. That is the object and prayer of the bill. The jury found "the issues in this case in favor of the plaintiffs." The decree rendered thereon by the Chancellor was, in substance, that the deeds both to complainants and defendant, be delivered up and canceled—the sheriff's sale at which complainants bought be set aside ; that the property be resold under complainants' execution, and that the sheriff make a full return of his proceedings in the premises on the first day of the next term.

We do not think that the issue made in the case, and the verdict of the jury authorized such a decree. If Winter, the defendant in execution, or any of his creditors, had any equities in the matter, they were not parties to these proceedings ; and if they are paramount to those of the complainants, they, not being bound by the judgment, may still assert them. Until they do so assert them, a Court is not bound to provide for them. The issue was made between complainants and Wilkins. The finding of the jury was in favor of the former. The rights of outside parties were not involved and could not be determined. Such other persons could have been parties

by a cross-bill of the defendant, or upon their own application, if a proper showing for that purpose had been made. If, under any state of the pleadings, their interests could be reached and bound by the provisions of the decree, that very fact would have entitled them to become parties. The verdict must mean not only that Wilkins did not have a good title, but that complainants did. This would secure to them the decree they asked. The jury could not have found that Wilkins' title was invalid, and that it should be set aside, unless upon a demand by some party who established a right in himself. A plaintiff in ejectment must show title in himself, and without this cannot obtain any judgment against a defendant, though it may be made plain that there is an absolute want of title or claim of right in him—nay, though he may be a mere trespasser. And we cannot see how, in this case, a verdict finding the issues in favor of complainant, can be made the basis of a decree to cancel his own deed.

Granting that it is a matter of sound discretion in the Chancellor to grant or refuse the relief prayed for, according to what he may adjudge is reasonable and proper under all the circumstances of the particular case—(and so say the authorities: 2 Story's Equity, section 793)—but this applies more particularly under those judiciary systems where the Chancellor decides both law and fact. Nor does such a rule mean even then, that the Court is not bound by the case before him, to pass only on the rights of the parties to it, and as those rights may be affected *inter sese*, by their own conflicting equities.

If a jury have power to determine facts, and do determine them by verdict, the Court is shut in by their finding, and must mould the decree in accordance therewith.

Judgment reversed.

White et al. vs. Haslett et al.

THOMAS C. WHITE *et al.*, plaintiffs in error, *vs.* WILLIAM M. HASLETT *et al.*, executors, defendants in error.

1. Where a rule absolute is rendered against a sheriff for his failure to make the money on an execution placed in his hands for collection, the defendants in execution cannot except to the judgment of the Court.
2. Should the sheriff fail to except, and thereafter attempt to enforce the execution against the defendants for his indemnity, they will then have the opportunity to protect themselves.

Bill of exceptions. Sheriff. Before Judge ANDREWS.
Elbert Superior Court. March Term, 1873.

For the facts of this case, see the decision.

H. A. ROEBUCK, by CLARK & Goss, for plaintiffs in error.

R. TOOMBS, for defendants.

WARNER, Chief Justice.

This was a rule against the sheriff of Elbert county, calling upon him to show cause why he should not pay over to the plaintiffs the amount due on an execution placed in his hands in favor of the executors of Rucker *vs.* T. C. and J. S. White. The sheriff, in answer to said rule, showed for cause that an affidavit of illegality had been made by the defendants to the execution which had been returned by him to the Superior Court of said county, and had been since sustained by the Court. It also appears in the record that the defendants had deposited the sum of \$3,000 00 in the hands of Mattox & Foition, who bound themselves to pay to the sheriff the amount of the execution in the event he should be made liable therefor, on a rule absolute being obtained against him. The Court, after hearing argument, made the rule absolute against the sheriff for the amount due on the execution. Whereupon the defendants in the execution excepted to the judgment of the Court, and prosecuted their writ of error to this Court, the sheriff refusing to except to the judgment of the Court against him, and to prosecute a writ of error to this

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Court therefrom. Whether the Court below erred in making the rule absolute against the sheriff is not the question now before this Court, but the question before us is whether the defendants in the execution can except to the judgment against the sheriff, making the rule absolute against him for being in contempt of the process of the Court placed in his hands by the plaintiffs against them.

In our judgment, they cannot do so. If the sheriff thought proper to abide the judgment of the Court against him, it was his privilege to do so upon his own responsibility, but if he should attempt to enforce the execution against the defendants hereafter for his indemnity, they will then have the opportunity to protect themselves.

Let the judgment of the Court below be affirmed.

THOMAS A. FOSTER, plaintiff in error, vs. HENRY O. HIGGINBOTHAM, defendant in error.

1. A claimant of property levied on by an execution issued on a judgment founded on an attachment cannot, on the trial of the claim, traverse the grounds on which the attachment issued.
2. When a reversal of a judgment is asked on account of an error alleged to be committed by the Court on a question of fraud, which, it is claimed in the argument before this Court, was made and argued on the trial of the case, it should be distinctly made to appear in the record what that error was. If it be on the ground of error in the charge of the Court on the matter of fraud, the bill of exceptions should show the charge, and as it does not appear what the charge was on that point, the presumption is that it was correct.

Attachment. Claim. Practice in the Supreme Court. Before Judge HARVEY. Gordon Superior Court. February Adjourned Term, 1873.

On September 12th, 1871, Higginbotham sued out an attachment against one George W. Lay as principal, and Charles Lay as security, for \$900 00, besides interest, upon the ground that they resided out of the State. The attachment was levied

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upon certain land as the property of the defendants. Judgment was obtained, and the execution issuing therefrom was levied upon the same land as belonging to Charles Lay. A claim was interposed to this property by Thomas A. Foster. Upon the trial of the issue thus formed, much evidence was introduced to show that George W. Lay resided in Gordon county at the time the attachment issued. The Court charged the jury that the claimant, upon the trial of this issue, would not be permitted to attack the ground upon which the attachment issued, thus virtually excluding said testimony.

The jury found the property subject to the execution. The claimant moved for a new trial, on account of error in the aforesaid charge. The motion was overruled and claimant excepted.

There seems to be another exception to the charge of the Court on the subject of fraud, but it is so indistinctly stated in the bill of exceptions, that it is difficult to arrive at the precise point made, especially as the charge is not given.

W. H. DABNEY, for plaintiff in error.

J. C. FAIN, for defendant.

TRIPPE, Judge.

1. In *Dow, Wilson & Herreman vs. Smith & Company*, 8 Georgia, 551, the contest was over the distribution of money in the hands of the sheriff. One party claimed as general judgment creditors—the other claimed under a judgment on attachment of older date. The former tendered an issue traversing the truth of the ground of the attachment alleged in the affidavit on which it was sued out. The judgment of the Court below, refusing to permit the issue to be made, was affirmed. This Court said, “it is exceedingly questionable whether this could be done by the defendants themselves, especially after the appearance term of the attachment. We are quite confident that third persons had no such right after judgment had been rendered on the attachment.”

That decision is applicable to this case. If judgment creditors have no such right, who may never have known of the attachment until after judgment upon it, there is more reason in not allowing it to a claimant of the property levied on by the attachment, and by the execution issued on the judgment rendered thereon, and who, in all probability, had notice of the levy of the attachment.

Since the decision in 8 *Georgia*, *supra*, was pronounced, the Legislature passed an Act limiting the right of a defendant in attachment to traverse the truth of the ground in the affidavit, to the first term: Acts of 1855, 1856; New Code, section 3312; 30 *Georgia*, 40; 37 *Ibid.*, 18.

2. The charge of the Court, "that the claimant cannot attack this attachment and judgment on the ground that G. W. Lay, one of the defendants, resided in said county of Gordon at the time the attachment was issued; this matter cannot be inquired into by this Court, and the jury cannot consider it," we think was only an enunciation of the foregoing principle, and that it was so intended by the Court. Counsel for plaintiff in error argued that it excluded the jury from considering that fact, as part of the claimant's evidence, in setting up the question of fraud between the plaintiff and G. W. Lay. It does not appear from the portions of the charge given in the bill of exceptions that the matter of fraud was considered by the Court, or that there was any request to charge upon that subject. Nor does the bill of exceptions show that the issue of fraud was raised. The charge excepted to was a correct and proper legal principle. It was a negation on the right of claimant to traverse the attachment affidavit. It was appropriate to the issue made. If there was the further issue of fraud, the presumption is that the Court charged upon it, and that the charge was right. The bill of exceptions should distinctly show the error complained of, and that the issue on which the error was committed was made in the case. Justice to the Judge and to the other party require this.

Judgment affirmed.

Atlanta and Richmond, etc., Company *vs.* Mangham & Prickett.

ATLANTA AND RICHMOND AIR LINE RAILROAD COMPANY,
plaintiff in error, *vs.* **MANGHAM & PRICKETT,** defendants
in error.

1. Where the plaintiffs proceeded to deliver cross-ties to the defendant under a written contract, one of the provisions of which was, in substance, that in case of any dispute touching the contract, the parties waive any right of suit or any other remedy in law or otherwise, and the decision of the chief engineer of the defendant shall, in the nature of an award, be conclusive on the rights and claims of said parties, and said chief engineer decided against the plaintiffs upon a claim presented by them, the award of the chief engineer was no more binding than the award of any other arbitrators selected by the parties.
2. The agreement of the parties should be construed to mean that they would abide a legal award.
3. As the General Assembly could not pass a law impairing the right of parties to appeal to the Courts to vacate an illegal award, the chief engineer of a railroad company cannot, by his award under such a contract as is presented in this case, impair that right.

Constitutional law. Award. Before Judge HOPKINS.
Fulton Superior Court. October Term, 1872.

For the facts of this case, see the decision.

COLLIER & HOYT, by P. L. MYNATT, for plaintiff in error.

PEEPLER & HOWELL; B. H. HILL & SON; T. P. WEST-MORELAND, for defendants.

WARNER, Chief Justice.

The plaintiffs brought an action against the defendant for the sum of \$1,875 92, on an account stated for cross-ties furnished it. It appears in the record that the defendant elected to submit the facts and the law of the case to the presiding Judge, by not filing an issuable plea under oath, whereupon the Court appointed an auditor to ascertain the facts and report the same to the Court, under the provisions of the 3062d section of the Code. The parties appeared before the auditor and introduced evidence, without objection, so far as the record

shows. The defendant offered in evidence a written contract, signed by the parties, for the delivery of the cross-ties, containing the following stipulation: "The decision of the chief engineer of the company shall be final and conclusive in any dispute which may arise between the parties to this agreement relative to or touching the same, and each and every of said parties do hereby waive any rights of action, suit or suits, or any other remedy in law, or otherwise by virtue of said covenants, so that the decision of the chief engineer shall, in the nature of an award, be final and conclusive on the rights and claims of said parties." The chief engineer decided against the plaintiffs' claim. On the trial before the auditor, the evidence showed that the chief engineer had made a clear mistake in his award as to the number of cross-ties which the plaintiffs had delivered, and which had been received by defendant, and the auditor so reported. The evidence before the auditor also showed that the chief engineer was a stockholder in the defendant's company, and was, therefore, not a disinterested arbitrator, which fact was not known to the plaintiffs at the time of the execution of the contract, and so the auditor reported, and upon the evidence before him, also reported in favor of the plaintiffs' demand. The Court affirmed the report of the auditor, by its judgment, to which the defendant excepted.

There was no point made before this Court as to the facts, but the only point made here was as to the legal effect of the written contract not to resort to the Courts for redress, on the statement of facts disclosed in the record, the defendant insisting that the award of the chief engineer was conclusive as to the rights of the parties. The Constitution of this State declares that the right of the people to appeal to the Courts shall never be impaired. Ordinarily, this contract to abide the award of the chief engineer, as arbitrator, would be as binding on the parties as any other agreement of parties to abide the award of arbitrators, and no more. Whatever would be sufficient grounds to set aside an award in a Court of equity would be sufficient to set aside this award. If the award of the chief engineer was the result of mistake or fraud, or if he was an

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interested party, his award may be attacked and set aside as well as any other award, and the plaintiffs had the clear constitutional right to resort to the Courts for that purpose, on the statement of facts contained in the record.

In this State, parties may obtain the same relief against an award in a Court of law as in a Court of equity. An award of a chief engineer of a railroad, which is the result of accident, fraud or mistake, or illegal for any other cause, is not so sacred and potent that it cannot be set aside by an appeal to the Courts. The agreement of the parties to abide the award of the chief engineer should be construed to mean that they would abide a legal award, and not an *illegal* award.

If the General Assembly could not pass a law impairing the right of parties to appeal to the Courts to get rid of an illegal award submitted to arbitrators by their agreement, the chief engineer of a railroad company cannot, by his award under this contract, impair the right of the plaintiffs to do so; it would be contrary to the public policy of the State as declared in its fundamental law. There was no error in the judgment of the Court as to the law applicable to the uncontested facts found by the auditor, as the same appear in the record before us.

Let the judgment of the Court below be affirmed.

JOHN D. FIELD, Jr., plaintiff in error, vs. MARTHA C. MARTIN, administratrix, defendant in error.

1. Where one of two obligees in a bond for titles dies, the action for a breach of the bond, for not executing a deed as provided in the bond, may be brought in the name of the survivor.
2. If the obligor in the bond, after its execution, sell the land to a third person, giving such person a bond for titles, puts him in possession, and receives the whole of the purchase money, it is a breach of the first bond, and no demand for a deed is necessary before action is brought.
3. Although it may be necessary for the plaintiff to aver in his pleadings the fact that he is the survivor, as well as the facts as to the second

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sale, in order to be entitled to prove them as a matter of right, yet if the testimony be admitted without objection, and no motion is made to withdraw it from the jury, he is entitled to the benefit of such testimony on a motion for a non-suit.

Bond for titles. Demand. Joint obligees. Non-suit. Pleading. Before Judge KNIGHT. Lumpkin Superior Court. April Adjourned Term, 1873.

This is the second time this controversy has been before the Supreme Court. See 46 *Georgia Reports*, 99.

John D. Field, jr., brought complaint against Martha C. Martin, as administratrix upon the estate of William Martin, deceased, for \$150 00, besides interest, alleged to be due upon a bond for titles, executed by said intestate, on November 6th, 1847, by which he obligated himself to make to plaintiff and to David Nichols a warranty deed to certain lands, upon the payment to him of \$150 00. The declaration set forth the payment of the purchase money, a demand for a deed to plaintiff, or a repayment of the purchase money, with interest, and a refusal of defendant to comply with either request.

The plaintiff introduced the admission of the defendant, as to the demand and refusal alleged in the declaration. Also, the bond for titles to plaintiff and Nichols, and the receipt of intestate for the purchase money from the plaintiff. Also, bond for titles, covering the same land, from intestate to John Huff, dated October 27th, 1856. Also, the return of William Martin, the intestate, as the administrator upon the estate of David Nichols, deceased, showing claim to an undivided half interest in the aforesaid land. Also, a second return, showing that no property had come to his hands.

John Huff testified that the bond executed by the intestate to him was genuine; that he paid the purchase money before Martin's death; that the lot, at the time of his purchase, was of the value of \$200 00; that at the time of his purchase, the widow of Nichols was in possession, under Martin, but she gave up the place to him, and he has since retained possession.

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Plaintiff closed. Defendant moved for a non-suit. The motion was sustained, and the plaintiff excepted.

WIER BOYD; H. P. BELL, for plaintiff in error.

W. P. PRICE, for defendant.

TRIPPE, Judge.

1. This case was before this Court, as reported in 46 *Georgia*, 99. It was then in the names of John D. Field, jr., su for himself and David Nichols, for the use of John D. Field, jr. It was held, that Nichols being dead, the suit could not go on in his name, the Court saying, "We will not say that Field may not, as survivor, bring an action on the bond, but he must show a breach," etc. Upon the new trial that was had, plaintiff amended his declaration, by striking out the name of "Nichols, for the use," etc., so that now it is in his own name. The rule is, that where one or more of several obligees, covenantees, partners, or others, having a joint legal interest in the contract, dies, the action must be brought in the name of the survivor: 1 Chitty on Pleadings, 11. This is a case of two joint obligees, and one being dead, the suit can be maintained in the name of the survivor. It was further held in 46 *Georgia, supra*, that the obligation on the bond was to make the title to both Field and Nichols; and that a demand by Field to have a deed made to him, individually, although he may have paid all the money, and refusal by the obligor so to make it, was no breach of the bond.

2. Plaintiff, on the trial, proved that the obligor on the bond, in 1856, sold said land to one John Huff, and gave him a bond for titles to Huff, and that Huff had paid the purchase money, and claims this to be a breach of the bond. In *Bay vs. Bernhard*, 12 *Georgia*, 150, it was decided, that in an action on a bond for titles, it is necessary to aver a demand and prove it, or to aver a sufficient excuse for not making a demand and prove it. The fact in that case was, that the obligor

never had a title to the land which he bound himself to convey, and that was held a sufficient excuse. It was further stated in that decision, that where a vendor has incapacitated himself from executing a conveyance to the purchaser, it makes further action on his part unnecessary. He can, in such a case, maintain an action without even tendering the purchase money. Inability to comply with his covenant, is itself a breach. Various authorities are referred to in support of this proposition: 1 Sug. on Vendors, 275, 276, top page 6 Am. Ed.; 1 Esp. cas., 189; 1 H. Black. 270; 6 Cow., 18. We recognize the reason of this principle, and that it is well founded in authority, and that it determines this case. The obligor in this bond, subsequent to its execution, sold the land to a third party, put him in possession, and received all the purchase money. This certainly was in violation of, and a breach of the bond to plaintiff. The bond that he made to Huff, when he received the purchase money, was not only a color of title which, by possession for seven years, would be good against everybody; but the moment the obligor received the money, was as a perfect equity, as good against Martin as a formal deed executed with full solemnity. He was disabled from moving against Huff on account of his own act; and yet there was his bond outstanding to plaintiff. It was an act of hostility to, and in denial of his first bond, and rendered any action on the part of plaintiff, before bringing his suit, as unnecessary as if a deed had been made to Huff.

3. It is true that there was no averment in the declaration of a breach, on the ground of the facts that were proven in reference to the sale to Huff, to-wit: the bond to him and receipt of the purchase money from him. But the evidence was admitted without objection, there was no motion to withdraw it from the jury, and the case was dismissed after plaintiff had closed, on the grounds that the plaintiff could not maintain the action in his own name, and that a demand for title, to be made to himself, and a refusal so to do by obligor, was no breach of the bond. It may be necessary for plaintiff to amend his declaration and describe himself as survivor, and

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also to allege the sale to Huff, etc. But he ought to be allowed the privilege so to do. The testimony showed both of these facts. Had there been a verdict for plaintiff, no motion in arrest of judgment could have been sustained for any defect in the pleading which could have been amended. The verdict would have cured such. If so, a non-suit or dismissal on these grounds was error. If the evidence would have sustained a verdict, and a verdict cured the defects, that was sufficient answer to a motion to dismiss. Had the admission of the testimony been objected to because the averments did not authorize it, or had a motion to rule it out after it was admitted on that ground, and no amendment been made to justify its introduction, then either motion would have been in order and when sustained, a motion to dismiss might have been proper. But whilst the evidence was before the jury unobjectioned to, the party introducing it was entitled to the benefit of it: See 39 *Georgia*, 708; *Siesel & Brother vs. Harris*, 48 *Georgia*, 652.

Let the judgment dismissing the case be reversed.

E. GUTHMAN, plaintiff in error vs. M. T. CASTLEBERRY, defendant in error.

1. Where the landlord occupied a room in the same building, immediately over the store of the tenant, he is presumed to have known the condition of the roof better than the tenant, and notice by the tenant to the landlord to repair such roof is unnecessary to entitle the tenant to recoup the damages sustained by leakage as against a distress warrant for rent.
2. The landlord is not liable to the tenant for damages to his goods, resulting from unforeseen and extraordinary causes, unless so stipulated in the contract at the time of renting.

Landlord and tenant. Repairs. Notice. Recoupment. Before Judge HOPKINS. Fulton Superior Court. April Term, 1873.

For the facts of this case, see the decision.

SAMUEL WEIL, for plaintiff in error.

JACKSON & CLARKE, for defendant.

WARNER, Chief Justice.

This was a distress warrant for rent sued out by the landlord against his tenant. The defendant filed a counter-affidavit denying that the rent claimed was due. On the trial of the issue in the Superior Court, the defendant alleged that his goods had been damaged to a greater amount than the rent claimed to be due, in consequence of the leaky condition of the roof of the storehouse rented, and sought to recoup the same against the plaintiff's demand. The jury, under the charge of the Court, found a verdict for the plaintiff. A motion was made for a new trial on the grounds set forth in the record, which was overruled, and the defendant excepted.

It appears from the evidence in the record, that the leak in the roof of the store-house was occasioned by an extraordinary fall of snow, which filled up the gutters on the roof, and caused the same to overflow; that the same was repaired as soon as it could reasonably have been done by the landlord. When a branch of this same case was before this Court at the last term, it was held that if the landlord failed to repair the roof of the store-house (the landlord under the provisions of the Code, being bound to keep the rented premises in repairs) after notice of its leaky condition, and the defendant's goods were damaged thereby, he was entitled to recover such damages from the plaintiff and have the same deducted out of the amount of the rent claimed to be due, and that we think would be the proper rule when the tenant has the exclusive possession and control of the store-house rented. But in this case, the evidence shows that the landlord occupied the room immediately over the room occupied by the tenant in the same building, and therefore, must be presumed to have known the condition of the roof of the building as well or better than the tenant. In such a case, we are inclined to

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hold that notice by the tenant to the landlord to repair the roof, would not have been necessary, and if it had been proved by the tenant on the trial, that the roof of the store-house was in such a condition as not to have protected the goods therein from water, under ordinary circumstances, that he would have been entitled to have recouped the damages sustained against the plaintiff's claim for rent; but there is no evidence of that kind in the record which would have authorized the Court to have so charged the jury. If the tenant desires to protect himself from loss or damage by accidents which result from unforeseen and extraordinary causes, he must so stipulate in his contract at the time of renting. There is no evidence in the record that the store-house was not in a tenantable condition on account of the roof but for the extraordinary fall of snow which caused it to leak as before stated. The plaintiff's own goods in the room above the one occupied by defendant were damaged more than defendants by the same cause.

Let the judgment of the Court below be affirmed.

THOMAS J. STALLINGS, executor, plaintiff in error, vs. WILKINS S. IVEY, administrator, *et al.*, defendants in error.

A sale of land by an administrator *cum testamento annexo*, made under an order of the Court of Ordinary, to pay the debts of the testator, where the estate is insolvent, discharges the land of the lien of the vendor for the unpaid purchase money, and the creditor must look to the proceeds in the hands of the representative of the estate.

Administrator's Sale. Vendor's lien. Before Judge DAVIS. Walton Superior Court. February Term, 1871.

Wilkins S. Ivey, as administrator *cum testamento annexo*, upon the estate of Mitchell Connor, deceased, filed his bill against the heirs and creditors, for the purpose of marshaling the assets. Upon this bill an issue was formed, as to whether

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a certain tract of land, sold by the complainant, was subject to a vendor's lien, in favor of Thomas J. and A. J. Stallings, as executors of William Stallings, deceased.

The evidence made the following case: In 1858, Thomas J. and A. J. Stallings, as such executors, sold said land to Mitchell Connor, taking his note for the purchase money. Judgment was obtained on this note at the February Term, 1861, of Walton Superior Court. After Connor's death, application was made to the Court of Ordinary, by complainant, for leave to sell the lands of the deceased, for the purpose of paying debts and the expenses of administration. Leave was granted, and on November 6th, 1866, the sale was made, and Emily Connor, the widow of deceased, became the purchaser of the land sold to deceased by the executors of Stallings. Thomas J. Stallings read the following notice before said property was bid off:

“GEORGIA—WALTON COUNTY.

“To Wilkins S. Ivey, administrator of Mitchell Connor, deceased.

“You are hereby notified that we, (?) A. J. Stallings, executor of William Stallings, deceased, hold an execution against the said Mitchell Connor and Ganaway Durden, issued from the Superior Court for said county, and any sale made by you of the property in your hands, as said administrator, or any part thereof, will be made at your risk, as we shall hold the same subject to said *fi. fa.*

“And notice is hereby given, that any purchaser of said property, purchases at his own risk, as we shall hold said property liable to pay said *fi. fa.*, and shall proceed to have the same executed, as soon as we shall be allowed by law to do so. Nov. 6, 1866. (Signed)

“T. J. STALLINGS.”

Verbal notice of a similar character was also given to the people in attendance upon the sale. Whether anything was said about the consideration of the judgment being the land about to be sold, the evidence was conflicting. Connor's estate was shown to be insolvent.

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The Court charged the jury, in substance, that a purchaser under the above statement of facts, held the land subject to the vendor's lien, for the unpaid purchase money.

The jury returned a verdict in accordance with said charge.

The complainant and the defendant, Emily Connor, moved for a new trial, upon the ground of error in the aforesaid charge. A new trial was granted, and Thomas J. Stallings, executor, excepted.

BILLUPS & BROBSTON ; J. J. FLOYD, for plaintiff in error.

WALKER & McDANIEL ; CLARK & PACE, for defendants.

TRIPPE, Judge.

It is not necessary, under the decision we pronounce in this case, to determine the point whether the plaintiff in error could properly assert his claim of vendor's lien against the land in the hands of Mrs. Connor, the widow and purchaser at administrator's sale, on a bill filed by the administrator to marshal the assets of the estate. If the sale by the administrator displaced the lien of Stallings, the vendor, the judgment of the Court below granting the new trial was right. We hold that the sale by the administrator in this case, it being made under an order of the Court of Ordinary for the payment of debts, and the estate insolvent, discharged the land of the lien of the vendor for the purchase money.

In the case of *Sims vs. Ferrill*, 45 Georgia, 585, and *Carhart et al. vs. Vann*, 46 Georgia, 389, it was decided that where an estate is insolvent, and land is sold by the administrator or executor in the manner prescribed by law, such sale divests the lien of judgments obtained in the lifetime of the testator or intestate, and the creditor must look to the proceeds in the hands of the representative of the estate. The reasons assigned in *Carhart vs. Vann* for such a decision apply with equal force to the case of a vendor's lien. There are certain classes of debts or claims against estates which rank, in priority, the vendor's lien, as well as the lien of judgments.

Funeral expenses, expenses of administration, a provision for the support of the family, (see *Cole vs. Elfe*, 23 *Georgia*, 235; 38 *Georgia*, 264; Acts of 1838 and 1850; section 2530 of the Code,) and taxes, are all to be paid before any other claim. In *Clements vs. Bostwick et al.*, 38 *Georgia*, 1, it was held that the fact of a vendor having a claim for unpaid purchase money, where title had vested in the husband, would not bar the widow's right to dower in such land. Sections 1760 and 1761 of the Code allow a widow, with the assent of the executor or administrator, to elect a life estate in one-third of the proceeds of the sale of the land of her husband's estate; or, with the approval of the Ordinary, an absolute estate in such an amount of money as the commissioners may assign, and which amount shall be paid in *preference to all other claims*, out of the proceeds of the land. It was decided in *Webb vs. Robinson et al.*, 14 *Georgia*, 216, that creditors who become such without notice of a vendor's lien are protected against such lien.

This array of debts or claims which have a priority over the vendor's lien, as well as over judgment liens, shows the necessity, as was stated in the case of *Carhart et al. vs. Vann*, *ut supra*, in relation to the lien of judgments, "of allowing the administrator or executor to divest *vendor's liens* by sale of the decedent's property to pay the debts of the estate. Otherwise, the practical effect would be to give the *vendor's lien* priority over the classes hereinbefore named, for property would bring little or nothing at administrator's sales, if liable to be afterward levied on and sold," under a decree for the enforcement of the vendor's lien.

Another serious difficulty would exist if a contrary rule were held—a difficulty that would bar the whole policy of the law as to administrator's sales. A vendor's lien can only be asserted in equity. Such a creditor would be compelled to wait twelve months from the time of granting administration to commence suit. Then a suit in equity would be necessary. A decree would be required and a sale had under that decree. In the meantime the representative of the estate could do noth-

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ing towards making a sale, however urgent the necessity might be to discharge those claims or debts which at last would be first paid, but which would be compelled to be brought into the suit in equity, so as to be protected by the decree of the Court in such a suit. Thus, in cases of debts of unquestioned priority, there would practically be a bill to marshal assets, with greatly increased expenses, and a delay seriously postponing those who so properly are the first objects of the law's bounty and protecting care.

We can see no necessity for requiring such proceedings to be had, no principle demanding it, and no danger to the rights of a creditor having such a lien, under the decision we make. The administrator is a sworn officer or agent, acting under the judgment of a Court, with as well defined a line of duty pointed out by the law, as the sheriff or any other officer would have, and the rights of all parties in such cases could, with equal safety and a more speedy enjoyment, be secured in his hands.

Judgment affirmed.

R. A. LANSDALE *et al.*, plaintiffs in error, *vs.* PETER F. BROWN *et al.*, defendants in error.

1. When a bill was filed, seeking the partition of a lot of land between tenants in common, and an account, the complainants claiming seven-eighths and the defendants one-eighth, and fails to show whether the defendants were in possession of a greater portion of the land than their share, or whether said defendants were holding adversely to the complainants, or anything going to show a liability on the part of the defendants, as tenants in common, to account for the rents and profits of the land, a demurrer thereto was properly sustained.
2. If the other allegations in the bill had been sufficient, the number of parties defendant might have been a good ground for equity jurisdiction to prevent a multiplicity of suits.

Equity. Partition. Tenants in common. Multiplicity of suits. Before Judge CLARK. Sumter Superior Court. April Adjourned Term, 1873.

For the facts of this case, see the decision.

C. T. GOODE, for plaintiffs in error.

W. A. HAWKINS ; B. P. HOLLIS, for defendants.

WARNER, Chief Justice.

This case was a bill filed by the complainants against the defendants, praying for a partition of a lot of land in the county of Sumter, the complainants claiming seven-eighths of the lot. The defendants demurred to the bill for want of equity, which was sustained by the Court, and the complainants excepted. The object of the bill, as we understand it, (though it is very difficult to say what is the precise object of it, from the confused and imperfect allegations contained therein) is to have a partition of the land between the complainants and the defendants, as tenants in common, the complainants claiming seven-eighths of the land, and the defendants one-eighth thereof, and to have an account and decree against the defendants for the rents and profits of the land. Whether the defendants are in possession of a greater portion of the land than their one-eighth share would be, on a division, does not appear, nor does it appear that the defendants are holding adversely to the complainants, any more of said land than one-eighth thereof, or that there has ever been any actual ouster of complainants, as tenants in common, by the defendants, or anything going to show a liability on the part of the defendants, as tenants in common with the complainants, to account to them for the rents and profits of the land, nor does the bill clearly and affirmatively show such a state of facts as would entitle the complainants to come into a Court of equity to have a partition of the land.

If the other allegations in the bill had been sufficient, the number of parties defendant might have been a good ground for equity jurisdiction to prevent a multiplicity of suits.

Let the judgment of the Court below be affirmed.

White et al. vs. Haslett et al.

THOMAS C. WHITE *et al.*, plaintiffs in error, *vs.* WILLIAM M. HASLETT *et al.*, executors, defendants in error.

1. Where, during the session of the Court, leave of absence for the term is granted to an attorney, and in a short time afterwards the attorney being present in Court, it was not error for the Judge, in order to prevent the continuance of a case in which such attorney was the leading counsel, to call the case for trial out of the regular order, unless it was made to appear that the attorney or his client was less prepared for trial on account of such leave of absence having been granted, or than they would be if the case were not called out of its order.
2. A defendant in execution who lodged with the levying sheriff, on the 15th of September, 1871, an affidavit that the legal taxes on the debt had not been paid, which affidavit was made for the purpose of arresting the sale, and did arrest the sale, and was prosecuted by the defendant to a trial as affidavits of illegality are tried, was liable, on the trial thereof, to the penalties provided by law for the filing of affidavits of illegality for delay only, provided the jury believed it was interposed for that purpose.
3. On the trial of such case, the only legal issue which, under any valid law, could have been before the jury, was whether such affidavit was filed for delay only; and plaintiffs having attached to the execution an affidavit of the payment of taxes before the defendant filed his affidavit and proved the same on the trial, and the defendant offered no evidence, "We, the jury, find for the plaintiffs ten per cent. damages," was a legal verdict, and one that covered the whole issue.
4. Where, by agreement, an order was passed allowing either party to except to a decision to be rendered at Chambers within ten days, and the bill of exceptions was not certified within the time specified, but within thirty days, these facts constitute no ground to dismiss the writ of error, as the consent order did not deprive this Court of jurisdiction, whatever effect it may have as between the parties. (R.) See end of Report.

Leave of absence. Illegality. Relief Act of 1870. Damages. Practice in the Supreme Court. Before Judge ANDREWS. Elbert county. At Chambers. January 4th, 1873.

An execution in favor of William M. Haslett and Elbert M. Rucker, as executors of Joseph Rucker, deceased, against Thomas C. White and J. S. White, based upon a judgment obtained in Elbert Superior Court on September 10th, 1866, for \$1,809 88, principal, and \$675 68, interest, was levied

upon the property of the defendants. The cause of action upon which said judgment was based accrued before June 1st, 1865. On September 12th, 1871, the plaintiffs attached to the execution an affidavit as to the payment of taxes, in compliance with the provisions of the Relief Act of October 13th, 1871. A counter-affidavit was filed by the defendant, Thomas C. White, and the papers were returned to the Superior Court.

The issue thus formed was called out of its regular order on the docket. J. D. Mathews, Esq., of counsel for the defendants, protested against proceeding with the case at that time, for the reasons that he had previously obtained leave of absence from the Court for the term, with the understanding that all cases in which he was leading counsel should be continued, and was then accidentally in the Court-room; that if called in its regular order, the case would not be reached in two days; that he would be compelled to abandon the defense.

The Court ordered the case to proceed. Upon the statement of counsel for plaintiffs that he would ask damages as in cases of illegality, where the affidavit was made for delay only, Mr. Mathews remained in Court and represented the defense.

Upon the trial, counsel for defendants insisted that the burden of proving that the taxes had been paid rested upon the plaintiffs in execution. The Court ruled to the contrary. Counsel for defendants stated that he was taken by surprise by the manner in which the case was called, and had no evidence to introduce. The plaintiffs were introduced and established the payment of the taxes.

The Court charged the jury, in substance, that the affidavit of the defendant, filed under the 5th section of the Relief Act of 1870, was an affidavit of illegality to the fullest extent, and that they had the power to assess such damages, not exceeding twenty-five per cent., as might seem reasonable and just, upon the principal debt, provided it should be made to appear that such affidavit was interposed for delay only.

The jury returned the following verdict: "We, the jury,

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find for plaintiffs in *fi. fa.*, ten per cent. damages, with costs of suit."

The defendants moved for a new trial upon the following grounds, to-wit :

1st. Because the Court erred in ordering said cause to trial under the circumstances above stated.

2d. Because the Court erred in ruling that the burden of proof upon the issue, as to the payment of taxes, was on the defendants.

3d. Because the Court erred in its charge.

4th. Because the verdict did not cover the issues made by the pleadings.

5th. Because the verdict was contrary to the law and the evidence.

The motion was overruled and the defendants excepted.

When the case was called in the Supreme Court, counsel for defendants in error moved to dismiss the same, because, as appeared from the bill of exceptions, a consent order of Court was taken confining each party to ten days from the decision upon the motion for a new trial, which was to be rendered in vacation, within which to except, whilst said bill of exceptions was certified and filed after the expiration of said specified time. It appeared that the certificate and filing was within thirty days from the rendition of the decision.

The Court overruled the motion, holding that such consent order could not deprive the Supreme Court of jurisdiction, whatever effect it might have as between the parties.

J. D. MATHEWS; H. A. ROEBUCK, by CLARK & Goss, for plaintiffs in error.

ROBERT TOOMBS, for defendants.

TRIPPE, Judge.

1. There is nothing in the record showing any possibility of damage to plaintiffs in error, on account of calling the case by the Court out of its regular order ; or because, a short time previous, leave of absence had been granted to their counsel.

It was not claimed that the attorney or clients were less prepared for trial than they would have been, had such leave not been granted, or than they would be, if the case were not then called.

2. The mere fact that an affidavit of illegality is based on grounds that are not good in law, or that it is filed under the provisions of an Act of the Legislature, which is finally pronounced unconstitutional, does not prevent the plaintiff in execution from claiming damages, if it be made to appear on the trial, that it was interposed for delay only. If it is filed with the sheriff, as an affidavit of illegality, accepted by him, as such, and the sale thereby arrested, and it is returned into Court, is heard and tried as other like cases are tried, and the jury find that it was the purpose of the defendant to secure delay only, a case is made for damages. If the grounds set forth be not only not good in law, but not true in fact, and the defendant could have had good reasons, if he had made inquiry of the sheriff as to the papers in the case, then lodged with him, to believe that the grounds were not true, and still prosecutes his affidavit to trial, and does not offer any evidence to sustain even the truth of his allegations, he is clearly liable to the penalties prescribed for the filing of affidavits of illegality for delay only.

3. It is contended that the verdict of the jury being simply, "We, the jury, find for the plaintiffs ten per cent. damages," was illegal, because it did not cover the whole issue, in this, that it did not find that the taxes had been paid. In the case of *Mitchell vs. Cothran & Elliott*, decided at the January term, 1873, not yet reported, it was held, that a verdict of a jury finding that the taxes on a debt contracted before June 1st, 1865, had not been paid, is on an immaterial issue, * * * and that it was error in the Court to dismiss the plaintiff's action for such non-payment. If such an issue be immaterial, it was not necessary for the verdict to contain a finding upon it. The only legal issue that could have been before the jury in this case, was, did defendants interpose the affidavit for delay only? In finding damages, the jury decided affirma-

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tively on that issue. The verdict legally implies that fact, and it covers the whole issue.

Judgment affirmed.

COLQUITT & BAGGS *et al.*, plaintiffs in error, vs. P. H. OLIVER, defendant in error.

1. Where a verdict was rendered in the County Court prior to its abolishment, and an appeal entered after, but within the four days allowed by law, the judgment entered against the security on appeal on the second trial, was valid.
2. The acceptance of the appeal bond by the County Judge was a ministerial and not a judicial act; It was nothing more than the transmission of the unfinished business of the County Court to the Superior Court.

County Court. Appeal. Judgment. Before Judge CLARK.
Sumter Superior Court. April Adjourned Term, 1873.

For the facts of this case, see the decision.

W. B. GUERRY; HAWKINS & GUERRY; B. P. HOLLIS,
for plaintiffs in error.

C. T. GOODE; ALLEN FORT, by N. A. SMITH, for defendant.

WARNER, Chief Justice.

On the 20th of July, 1868, a verdict was rendered in the County Court of Sumter, in favor of Oliver against Adams. On the 24th July, 1868, an appeal was taken by Adams, who executed his appeal bond before the County Judge, with Foster as his security, which was entered on the record book of said Court, and the case was transmitted to the Superior Court, in which a trial was had, and a verdict rendered against Adams on the appeal trial, upon which, judgment was entered against Adams, and Foster as his security on the appeal.

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The property of Foster having been sold by the sheriff, and the money arising from the sale thereof being in the sheriff's hands, on a motion to distribute the same, Colquitt & Baggs, and others, being junior judgment creditors of Foster to Oliver's judgment, moved the Court to set aside Oliver's judgment obtained against Foster, as security on the appeal for Adams, on the ground that the judgment was void as to them, inasmuch as the appeal from the verdict in the County Court was taken, and the appeal bond executed before the County Judge after the County Court was abolished by the adoption of the Constitution of 1868, on the 21st day of July of that year. The Court refused the motion, and ordered the money in the hands of the sheriff to be paid to Oliver's execution, which was the oldest. Whereupon, the other judgment creditors of Foster excepted.

1. The verdict against Adams was rendered before the County Court was abolished by the Constitution of 1868, and he then had the legal right to appeal therefrom within four days, by paying costs and giving security, which was done, and the case transmitted to the Superior Court, as provided by law.

2. The taking the bond and security by the County Judge, on the records of that Court, was a mere *ministerial* and not a *judicial* act; it was nothing more than a transmission of the unfinished business of the County Court to the Superior Court, and, in our judgment, the appeal was not void, nor was the judgment rendered thereon in the Superior Court, against the security on the appeal, void, under the provisions of the Constitution of 1868.

Let the judgment of the Court below be affirmed.

JAMES P. SIMMONS, plaintiff in error, vs. DANIEL M. BYRD
et al., defendants in error.

1. A judgment was obtained against a party who died in the latter part of 1863, testate, authorizing his executors to sell, either publicly or privately, certain of his slaves. The executors qualified in December, 1863. The judgment creditor, soon after the qualification of the execu-

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tors, urged them to sell the negroes, on account of the near approach of the Federal army. The executors refused, and hired out most of the negroes for 1864, but on the 6th of July, 1864, at the solicitation of the creditors, plaintiff included, defendants consented that they might be levied on and sold. A levy was made the next day on all the slaves, and they were taken in custody by the sheriff. In a few days, on account of threatened raids by the Federal forces, the negroes, by consent of the parties, were sent off by a mutual agent. In a short time they returned, but, nothing further appears to have been done with them by the sheriff or either of the parties:

Held, That the executors are not liable to such levying creditor for not having sold the slaves prior to the levy, it having been only seven months from the time of their qualification as executors, and after the levy was made, the negroes were in the custody of the law at the instance of the creditor.

2. Where an executor advances a support to the family of the deceased, although not specifically set apart by appraisers, he is entitled to be credited with it in accounting with the creditors and heirs, the burden being on him to show that it was a proper and necessary amount.
3. A judgment creditor of a testator cannot recover in an action on the case against an executor for not selling certain articles of personal property, when the creditor had it in his power to levy on the same, more especially if it be not shown that they were lost to the estate by not being sold by the executor, and the executor points them out to the creditor and directs him to levy.

Administrators and executors. Distribution. Execution. Levy. Before Judge RICE. Gwinnett Superior Court. March Term, 1873.

This case was tried before Judge Davis, but the motion for a new trial was heard by Judge Rice, he having in the meantime, come upon the bench.

James P. Simmons brought case against Daniel M. Byrd and Amanda H. Cates for \$10,000 00, damages alleged to have been sustained under the following circumstances: On December 7th, 1863, plaintiff was the owner of judgments against one Lodawick M. Cates, aggregating in amount to \$6,124 58; Cates having died, the defendants, as executor and executrix of his will, took possession of his estate, the same being of the value of \$30,000 00, and more than sufficient to pay all debts and liabilities. The defendants have

wasted the assets until there is not now more than sufficient to pay the liens of a higher dignity than those of your petitioner.

The defendants pleaded the general issue, and further, that the estate of Cates consisted almost entirely of negroes, which it was impossible to sell during the late war, except for Confederate money, which the plaintiff refused to take upon his claims. The property, besides the negroes, was not sufficient for the year's support of the family. The Federal forces were making raids through the country, which rendered negro property of little value. The plaintiff levied his executions upon the negroes, and they were placed in jail for safe-keeping, but they were subsequently, by his consent and direction, taken out of the county in order to prevent their capture by raiding parties, where they remained until slavery ceased to exist.

The facts disclosed by the proof were substantially as follows :

Lodawick M. Cates died in September, 1863, leaving a will which authorized his executor and executrix to sell, either publicly or privately, certain slaves. The defendants qualified as executor and executrix on December 7th, 1863, and assumed control of the estate. The plaintiff urged the defendants to sell the negroes, on account of the near approach of the Federal army. This they refused to do, and hired out most of the negroes for the year 1864; but on July 6th, 1864, at the solicitation of the creditors of the estate, the plaintiff included, consented that they might be levied on and sold. They were accordingly levied on under one of the plaintiff's executions and went into the custody of the sheriff. Shortly thereafter, on account of the approach of the Federal forces, by consent of all parties interested, the negroes were sent out of the county. Upon their return, nothing further seems to have been done by the sheriff, the plaintiff or the defendants.

The defendant, Byrd, used the hire of the negroes, with about \$500 00 of his own money, for the support of the family of testator. There was no evidence of the usual year's support having been set apart by appraisers.

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Much additional evidence was introduced which is thought to be unnecessary to an understanding of the decision, and is, therefore, omitted.

The jury returned a verdict for the defendants. The plaintiff moved for a new trial, because the verdict was contrary to the law and the evidence.

JAMES P. SIMMONS; WINN & SIMMONS; HILLYER & BROTHER, for plaintiff in error.

CLARK & PACE; J. N. GLENN; N. L. HUTCHINS, for defendants.

TRIPPE, Judge.

1. It is sought in this case to hold the executor liable to a judgment creditor of his testator, for not selling the slaves of the estate within less than seven months after his qualification as executor. The special reason assigned as making it a guilty default on the part of the executor in not so selling is, that the negroes were in danger of being lost to the estate and to the creditors, on account of the near approach of the Federal army to the section where the negroes were. We do not think this shows such negligence by the executor as to make him responsible for the loss of the slaves by emancipation, which occurred about nine or ten months thereafter. The slaves were not captured or taken by the Federal army. They were levied on by general consent, plaintiff included, and at his instance. By general consent the negroes were sent off to prevent capture. When so sent off they were under levy, in the custody of the law, and it seems that afterwards all parties were quiet; nothing done under the levy; and the whole matter was closed by the emancipation of the slaves in some six or eight months after their return. It would be a cruel hardship on the executor to make him responsible for not selling the slaves in seven months after he took letters. He was qualified as executor in the latter part of 1863. He had at once to decide whether he would hire them for the next

year or sell them. He decided to hire them, and did hire a large portion, working some on the farm belonging to the estate. This was not such an abuse of his power or discretion as to make him responsible for their loss, because, within four months after the expiration of the next year, the slaves were lost by the act of the government. After the levy in July, 1864, and that, too, by consent of the executor, and by the act or direction of the plaintiff, the negroes were in the custody of the law, for it seems that the levy was never dismissed.

2. It is also claimed that the widow and family of the testator consumed a portion of the estate furnished them by the executor, and that twelve months' support and maintenance had not been assigned them by appraisers, so as to authorize such use of it. We do not think that it is absolutely necessary that there should be a formal assignment made of a twelve months' support and maintenance to the family of a deceased person, to entitle the representative of the estate to a credit of what he may have allowed or given them for such support. It would, of course, be incumbent on him to show that what he had so furnished was reasonable and proper. He takes the hazard; but if he only furnish what the law would compel him to furnish, he is to be protected. We think this is not only consistent with the cases of *Blassingame et al., vs. Rose et al.*, 34 Georgia, 418, and *Wells vs. Wilder*, 36 Georgia, 194, but is almost necessarily the result of those decisions.

3. There were a few articles of property not sold or consumed by the family, and which were left with the widow, who was also executrix. The executor pointed them out to the creditor and directed him to levy. The creditor did not do so, and claims in this action, that the executor is liable therefor. The most there is in this point seems to be, that there must have been a dispute between the creditor and executor as to who should perform the ungracious task, so to call it, of selling, or having sold, the remnant of a once valuable estate. The creditor would not levy on it, and seeks, in an action on the case, to hold the executor responsible because he did not. It does not appear that the items of property have been lost to

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the estate, or as yet lost to the creditor, on account of the executor's not selling. There is no return on the plaintiff's execution of *nulla bona*, and how can he expect to recover for a *devastavit* by the executor without proof of the waste? We do not think the evidence on this point shows that the executor is responsible.

Judgment affirmed.

R. H. POWELL *et al.*, plaintiffs in error, vs. SARAH LAWSON, defendant in error.

1. The sheriff, under a writ of possession based upon a judgment rendered in an action of ejectment, has no authority to receive an affidavit from a person not a party to said suit, to the effect that she did not hold possession of the land as tenant under the plaintiff or defendant in ejectment, "or any one else."
2. Where, upon the trial of a case arising under the forcible entry and detainer law, the jury reported to the presiding Justice that they could not agree upon a verdict, and the magistrate told them that they must agree or he would take them with him to Blakely, and the jury subsequently returned a verdict for the defendant, but upon being polled, two of them stated that they had consented to the verdict, but had not agreed to it, and the Justice received the verdict over the objections of the plaintiffs:

Held, That the proceeding was illegal.

Ejectment. Forcible entry and detainer. Practice. Verdict. Jury. *Certiorari*. Before Judge HARRELL. Early County. At Chambers. September 13th, 1872.

For the facts of this case, see the decision.

R. H. POWELL, by brief, for plaintiffs in error.

SWANN & CARTLEDGE, by A. HOOD, for defendant.

WARNER, Chief Justice.

This was an application to the Judge of the Superior Court for a writ of *certiorari*, which was refused, and the plaintiffs

excepted. It appears from the allegations in the plaintiffs' petition for *certiorari* that the plaintiffs were the joint owners of a lot of land ; that at the October term of Early Superior Court, 1871, Hill, one of the plaintiffs, recovered the lot of land by an action of ejectment brought by him against one Evans, who was in possession of it ; that plaintiffs consented for Evans to remain in possession of the land, as their tenant, until he could gather his crop. About the 1st of November of that year, Evans went out and abandoned the possession of the land, but a day or two before Evans went out, Mrs. Lawson, the defendant, went into the possession of it. A writ of possession was issued by the clerk of the Superior Court to execute the judgment rendered in the ejectment suit in favor of Hill against Evans, commanding the sheriff to put the plaintiff in possession of the land. When the sheriff went to execute the writ, he found the defendant, Mrs. Lawson, in possession of the land, who refused to give possession to the plaintiff, and made an affidavit that she did not hold possession as tenant under Evans, Hill, or any one else, and tendered the same to the sheriff, who took the affidavit, returned it to the Superior Court, and left her in possession.

1. We are not aware of any provision in the Code of this State which would have authorized the sheriff to have received the counter-affidavit of Mrs. Lawson to the writ of possession, who was not a party thereto, and thus create an issue to be tried thereon in the Superior Court, by returning the papers to that Court, as was done by the sheriff in this case. The writ of possession placed in the hands of the sheriff, only authorized him to dispossess the defendant in the ejectment suit, and those claiming under him : Code, 3583.

2. The plaintiffs, however, proceeded against Mrs. Lawson, the defendant, for forcible entry and detainer, as provided by the 4014th section of the Code. On the trial of that issue before the Justice and jury summoned to try the same, it did not appear from the evidence in the record how or in what manner Mrs. Lawson got possession of the land ; there is no evidence of *any forcible entry* thereon by her. There is some evidence,

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however, of a forcible detainer of the premises by the defendant, that when one of the plaintiffs demanded possession thereof, he was ordered off by the occupants of the house. The jury found a verdict for the defendant, and if the trial had been legally conducted before the Justice, there would have been no error in the refusal of the Court to grant the *certiorari*, on the ground that the verdict was contrary to the evidence; in other words, this Court would not have controlled the discretion of the presiding Judge in refusing to sanction the *certiorari* on that ground. But the trial was not legally conducted, and we cannot sanction and maintain a verdict rendered under the facts and circumstances disclosed in the record. It appears that after the jury had retired to consider the case and make up their verdict, they reported to the Justice that they could not agree on a verdict; whereupon, the Justice told them that they must agree, or he would take them with him to Blakely. The jury then retired, and after staying out until about sundown, brought in a verdict for the defendant. On the jury being polled, two of them said that they consented to the verdict, but that they did not agree to it. The plaintiffs objected to the verdict being received, but the Justice overruled the objection and received the verdict.

Let the judgment of the Court below be reversed.

EDWARD C. MURPHY *et al.*, plaintiffs in error, *vs.* SAMUEL HARRIS, defendant in error.

There was no abuse of discretion by the Court below in granting the new trial in this case.

New trial. Before Judge HOPKINS. Fulton Superior Court. October Term, 1872.

Samuel Harris brought trespass against Edward C. Murphy and George W. Anderson, alleging that the defendants had unlawfully arrested and imprisoned him in the calaboose of

the city of Atlanta, and while thus detained, had robbed him of \$50 00, by threats of prosecuting and sending his son to the penitentiary, whereby he was injured and damaged \$5,000 00. The defendants pleaded the general issue.

Upon the trial substantially the following evidence was introduced:

Samuel Harris, the plaintiff, testified as follows: Was arrested by the defendant, Murphy, in August, 1869; had been to a pond near Grenville's mill to fill up his water-cart; took off his coat and left it there; in the pocket was \$200 00; his son, Harry, was with him; filled the boy's barrel with water and sent him off, then he followed; never thought of his coat until he arrived on Whitehall street; his son emptied his water first and went back to the pond; plaintiff told him about the coat; when he went back, met his son about ten steps from the pond with his load of water; his son said, "Father, it is not here;" followed his son back to town, met the defendant, Murphy, and told him he would give him \$50 00 to recover his coat and the \$200 00 in it; Murphy told him to bring his horse; he went off down the road; saw him no more for two or three hours; his son got the coat; met policeman Hinton, who was with Murphy; told him he had got his coat; run his hand in his pocket and told Hinton to tell Murphy to come to him and he would satisfy him for his trouble; soon after, met Murphy with his son, Harry; Murphy said, "halt, I want my \$50 00;" plaintiff said, "Mr. Murphy, you never got my coat—if you had gotten it and brought it, I would have given you \$50 00;" he said, "your son stole it;" I said he did no such thing; Capt. Anderson then said, "he claims the reward." Murphy said, "come on;" we went to Bradfield's drug store; plaintiff started to go out; Murphy said, "hold on;" two policemen came, and Murphy said, "take them to the guard-house;" plaintiff said, "what have I done; I will give bond;" two policemen carried them to the guard-house and locked them up; put them in different rooms; staid there twenty-five or thirty minutes; Murphy came and said to the two policemen, "take them to Boggus' office

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quick ;" when plaintiff got there, found Murphy there ; he said, "I want my \$50 00;" plaintiff said he could not give it, as he never got his coat ; he said, "if you don't, I will write a warrant and send your son to the penitentiary ;" plaintiff said, "good God, will you do that ?" Murphy went to dinner, and said to defendant, Anderson, "get that \$50 00 for me—if he don't pay it keep his son, and I will send him to the penitentiary ;" he paid the money ; Capt. Anderson said, "I have nothing to do with it, I must do as Murphy says ;" he said to me, after receiving the money, "go and get some friends, some attorneys, and tell them how Murphy has acted with you ;" I believe he said, "you ought to keep the money in your pocket." I staid two hours in Boggus' office ; he would not let plaintiff go out ; they never took out a warrant ; they threatened to do so ; plaintiff's wife was there crying ; she said, "pay the \$50 00, and let us get out of this trouble ;" have been before the grand jury and given evidence in this case ; it was about nine o'clock when he first told Murphy about his coat ; it was about an hour before his son brought his coat to him ; Murphy was captain of the police, and Anderson lieutenant under him ; it was the second time his son went back to the pond when he got the coat ; he was three or four hundred yards from the pond when he met him with the coat, and the money was in the pocket ; paid the money to Captain Anderson ; Anderson did not force him to pay it ; Murphy forced him ; his wife said pay it, as she was in so much trouble ; it was after Anderson got the money he told him to go to a lawyer ; Anderson did not tell him he would not receive it, unless he paid it freely and voluntarily.

E. C. Murphy, defendant, testified as follows : He met plaintiff on Alabama street ; said he had been robbed ; that he had \$200 00 in his coat pocket ; that he had left his coat at the pond from which he was hauling water ; that he would give defendant \$50 00 if he would get it for him ; told him to keep his mouth shut and he would put the right man on it and get it if it was in town ; sent for Captain Anderson and told him the circumstances ; he (Murphy) went to the pond

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and learned that no one had been there except an old one-armed man, and found that he was at home at the time plaintiff left; after riding about much and inquiring, became satisfied that the little negro who was plaintiff's son, had stolen the coat, and ordered him arrested; policeman Hinton arrested another little negro with plaintiff's son, and all went up Whitehall street and met plaintiff near a doctor's store; ordered some policemen to take them to the guard-house and he would take the case to Boggus' Court; he sent them to the guard-house because the boy said the money came from the "rag boys;" hunted for the rag boys; no one had seen them around there. In the meantime, plaintiff and his boy had been sent to the guard-house; sent for them to be brought to Boggus' office; they had not been at the guard-house longer than fifteen or twenty minutes; he had not intended to have them kept at the guard-house long; told Boggus to fill out a warrant for robbery against plaintiff's son; Boggus did not know how to write it; plaintiff was in the room at the time; had not been to dinner; left the case with Captain Anderson; said he would go to dinner, and when he returned would prosecute the case; had intended putting plaintiff on the stand as a witness against the boy, not then knowing he was his son; was not present when the money was paid; when he came back to the office the case was put off; did not know whether warrant was taken against the boy or not; left instructions with Anderson to have the warrant made out; did not swear out a warrant himself; did not think he told Anderson not to turn them loose unless \$50 00 was paid. Arrested plaintiff because he wanted him as a witness; did not want to go over the town for him; did not know, until he met plaintiff at the drug store, that the boy was his son; sent them to the guard-house after that; he never ordered them locked up; ordered them to the guard-house. There was a magistrate's office over James' Bank; Boggus' office was further from the place of arrest than that office; ordered them to the guard-house until he got the rag boys and other witnesses. Never took (Harry) him in the back room of Boggus' office and told him if he

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would admit that he took the coat and money, would turn him loose; told them in the office to hurry up and do what they were going to do, to have things investigated; the money was divided between three: myself, Captain Anderson and Johnson; I got \$20 00; there was an account standing between Anderson and me. I was chief of police; Anderson was captain under me; Hutchins was a policeman; Boggus was a Justice of the Peace. Never told plaintiff, in Boggus' office, that if he did not pay the \$50 00 he would send his son to the penitentiary; told him it would be a penitentiary offense if proven on him; he did not get his coat, but was instrumental in getting it; was so close on the boy that he brought it up. Did not consider plaintiff a prisoner in Boggus' office; would have allowed him to go; could have gone when he pleased; took him there for a witness.

George W. Anderson, defendant, testified as follows: About nine o'clock, Murphy told him of the case; told him that the old man had lost his money at the pond, and offered \$50 00 if he would get it; Murphy had been there and fixed it on a boy who was hauling water; we went out, met him and sent him to the guard-house; went with Murphy to Boggus' office; asked the old man what he was going to do, as Murphy was going to get a warrant for the young man; after discussing the matter a while, Murphy said he was going to dinner, and said to me, "You can arrange the matter; I will have him here; get a warrant out, and when I get back I will sign it." Murphy then went out. Do not remember whether the old man's wife was there or not; she pulled out the money and wanted plaintiff to pay it; he said he did not think it was right to pay it; defendant said, "Sam, if you don't think it right, go and consult a lawyer, and if it is not right, I don't want it;" the old lady said, "pay it;" plaintiff said, "yes, I will pay it;" defendant said, "if I receive it, you pay it voluntarily, that is the understanding;" told him to go out and consult a lawyer; the money was then lying on the table; there were no threats whatever made; gave him a receipt for the money; can hardly say what became of the money; don't know wheth-

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er he got any of the money or not; there was an understanding with Murphy as to dividing such money; his recollection is that they divided it; had no particular rule when they got a reward; sometimes he would get one-half, sometimes one-third; could not say that he got any of this money; it was his understanding that the \$50 00 was to be paid or his son must be prosecuted; that the payment of the \$50 00 was a discharge of the parties; plaintiff paid the \$50 00, and they were allowed to go; if he had not paid the \$50 00, should have held him until Murphy came back. When parties were sent to the guard-house, they were sometimes locked up and sometimes not; parties were sometimes put in different rooms to investigate things. Plaintiff and his son were in the streets sprinkling water, in the regular course of business; it was a common occurrence to take witnesses to the guard-house without making them prisoners; Murphy did not tell him to hold the old man there until the money was paid.

Policeman Hinton testified as follows: Murphy told him that the old man had lost his pocket-book and \$200 00 in it, and that he offered \$50 00 for its recovery, and wanted witness to go with him to hunt it; sometime afterwards met the old man, and he told him he had got his coat, that his son had brought it to him, that he had got his money, and wanted to know what he charged for his trouble; told him nothing, and referred him to Murphy; told Murphy that the old man had got his coat, and how he got it; Murphy said the boy had stolen the coat, "let us go and arrest him;" Murphy said, "take the old man along as a witness;" witness had before arrested another boy for stealing, and they all were carried to the guard-house; it was his understanding that the old man was to go along as a witness.

M. J. Ivey testified as follows: Was in the office of the Justice of the Peace, Boggus, when Anderson, Murphy, the old man (plaintiff) and his son, were there; while there, heard the question asked as to what was the proper offense to be charged against the boy; after some time Murphy left; the money was paid by the old man over to Anderson; Anderson

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said he would not receive it, unless paid voluntarily ; he was called to witness the fact that the same was paid voluntarily ; Anderson gave a receipt for the money ; think it was understood that he was to go when the money was paid.

— McAfee, for plaintiff, testified as follows : Saw the parties in Boggus' office ; gathered from the conversation of all the parties that plaintiff's son had been arrested by the police, charged with stealing the coat and money of his father, and that Murphy claimed \$50 00 from the old man as a reward he had offered for the recovery of coat and money ; the old man claimed he ought not to pay it, because his son had brought the coat and money to him ; understood that if the \$50 00 was paid the boy would be turned loose, if not, he would be prosecuted ; did not hear Anderson say anything ; did not know anything of the payment of the money ; did not know whether the old man was under arrest or not ; they were all in the office together.

Harry Harris testified as follows : He found the coat in the bosom of a rag-boy ; asked what was that in his bosom ? boy said it was none of his damned business ; he struck him, and took the coat from him ; went and gave the coat to his father ; met Murphy, who told him to get off his sprinkler, and said, I arrest you for stealing your father's coat ; Hinton arrested him and carried him to the drug store ; afterwards, Wooten, a policeman, came along, and Murphy said, take them to the guard-house ; afterwards were carried to Boggus' office, when Murphy said, get out a warrant for that boy for stealing his father's coat ; Murphy carried him in a private room, and said if he would say he stole the coat he would let him go ; Murphy said he was going to dinner, and told Anderson not to turn the boy loose until he got the \$50 00 ; Murphy said, "take charge of them, and if Sam. paid \$50 00, to turn them loose."

The jury returned a verdict for the defendants. The plaintiff moved for a new trial, upon the ground that the verdict was contrary to the law and the evidence. The motion was

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sustained and a new trial was ordered. Whereupon, the defendants excepted.

HILL & CANDLER, for plaintiffs in error.

THRASHER & THRASHER; W. A. TIGNER, for defendant.

TRIPPE, Judge.

This Court has frequently held that the rule is more liberal in reviewing the question whether the Court below has abused its discretion in deciding a motion for a new trial, where the same has been granted, than in the case of a refusal to grant such motion. In this case, we are satisfied that there was no such abuse. As the case is to be tried *de novo* on its merits, under the evidence, and as that is the sole question in it, we forbear to discuss it, and leave it to be again submitted to a jury, unbiased by anything we might say.

Judgment affirmed.

TOOLE & SHEMPHERT, plaintiffs in error, vs. WILLIAM P. JOWERS, defendant in error.

1. An affidavit made to foreclose a merchant's lien, under the 1977th section of the Code, must state that the deponent is either a factor or a merchant, and that, as such, he has furnished either provisions or commercial manures, or both, to the defendant, and also the terms upon which said supplies were furnished.
2. Proceedings to foreclose the lien must be commenced within one year after the debt becomes due.
3. The fact that the defendant had replevied the property by giving bond and security, did not deprive him of the right to move to dismiss the proceedings, he having alleged in his counter-affidavit that they were void under the law.

Factor's lien. Affidavit. Statute of limitations. Estoppel. Before Judge CLARK. Webster Superior Court. March Term, 1873.

For the facts of this case, see the decision.

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W. A. HAWKINS, for plaintiffs in error.

HAWKINS, GUERREY & HOLLIS; ALLEN FORT, for defendant.

WARNER, Chief Justice.

This was a proceeding on the part of the plaintiffs against the defendant to enforce a merchant's lien, under the provisions of the 1977th section of the Code. The lien of the plaintiffs is founded on an instrument executed by the defendant to the plaintiffs on his growing crop, pledging the same for the payment of two drafts drawn by the defendant upon the plaintiffs for advances made by them to him. The affidavit of the plaintiffs foreclosing the lien states that the defendant is indebted to them the sum of \$536 45, for supplies furnished him to make a crop for the years 1870 and 1871, but does not state that the defendant was indebted to them for provisions or commercial manures furnished him by agreement between them. The defendant made a counter-affidavit, and stated therein, amongst other things, that the affidavit made by the plaintiffs to foreclose the lien was made more than twelve months after the same became due, and that the execution was void under the law. On the trial of the issue in the Superior Court, when the plaintiffs offered in evidence the lien *fi. fa.*, and the levy thereon upon the defendant's property, the defendant objected thereto, on the ground that the *fi. fa.* and proceedings to foreclose the lien were void. Whereupon, the Court dismissed the proceedings, refused to allow the plaintiffs to amend their affidavit, and the plaintiffs excepted.

1. We find no error in the rulings of the Court in this case, on the facts as disclosed in the record: *Saulsbury vs. Eason*; *Pierce vs. Pattishal*, decided at the last term, not yet reported. In the last case cited, it was held that to create a lien under the 1977th section of the Code, and have the same enforced as steamboat liens on the growing crops of farmers, the plaintiff must allege in his affidavit that he is either a factor or a

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merchant, and that, as such, he has furnished either provisions or commercial manures, or both, upon such terms as may have been agreed on by the parties.

2. Besides, in the case now before the Court, the alleged lien claim was not prosecuted within one year after the debt became due, as is apparent from the date of the maturity of the drafts set forth in the record.

3. The fact that the defendant had replevied the property levied on to satisfy the lien *fi. fa.* by giving his bond, with security, did not deprive the defendant of his legal right to make the motion to dismiss the proceedings, he having alleged in his counter-affidavit that the same were void under the law.

Let the judgment of the Court below be affirmed.

WILLIAM O'HALLORAN, plaintiff in error, vs. ELLEN O'HALLORAN, defendant in error.

The verdict in this case, granting a total divorce, was not contrary to the evidence, or to law, or to the weight of the evidence, and where the property which is given by the verdict to the wife and children—she being the libellant—was the property of the wife at the time of filing the libel, it is not on that ground liable to be objected to by the husband. If the giving to the children an interest in such property could be excepted to, it was a matter of which the libellant only could complain, and not the defendant.

Divorce. New trial. Before Judge HOPKINS. Fulton Superior Court. October Term, 1873.

Ellen O'Halloran filed her libel for divorce against William O'Halloran, alleging adultery, cruel treatment, and habitual drunkenness. The following schedule of property possessed by petitioner, at the time of the separation, was annexed:

1st. Household and kitchen furniture of value of \$350 00.

2d. One-half lot of land, part of lot one hundred and eleven, in the fourteenth district of originally Henry, now Fulton county, of the value in specie of \$2,000 00.

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The record fails to disclose the plea of the defendant.

The evidence made out a clear case of cruel treatment and habitual drunkenness on the part of defendant. It also disclosed that the petitioner had two children by the defendant, a boy six years of age, and a girl three and a half; that the land set forth in said schedule belonged to petitioner.

The jury rendering the final verdict of divorce, gave all of the land specified in said schedule to the petitioner and her two children.

The defendant moved for a new trial, because the verdict was contrary to evidence, law and equity. The motion was overruled, and the defendant excepted.

HILL & CANDLER, for plaintiff in error.

L. E. BLECKLEY, for defendant.

TRIPPE, Judge.

This case was not argued before this Court, and as the sole ground in the motion for a new trial is that the verdict is against law and evidence, we have searched the record to ascertain if the verdict was authorized by the evidence. There can be no doubt that the testimony justifies the granting a total divorce, under the law, if the jury thought it proper so to find. It was in proof that the land in the schedule was the property of the wife at the time of filing the libel, and the jury gave it to her and the children. It was not wrong to allow the wife to keep what was already hers, when the husband had proved himself unworthy of her. As to the interest given to the children, that was a matter for the wife to complain of, if anybody could complain. The husband, in this case, cannot object that the children were let in to share their mother's property. It appeared from the wife's testimony that she was willing for her husband to have a portion. This she stated herself. But the jury would not be as liberal to him as she said she was willing to be, and we do not think they were wrong. It might be a question whether they could

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have given a part of the wife's property to the husband. By her consent, probably, all difficulty could have been avoided. But the jury did not feel justified in so doing. Under the evidence showing such cruelty and drunkenness, no one has a right to complain that the wife's land was secured to her and their children.

Judgment affirmed.

M. E. DANIEL, administratrix, plaintiff in error, vs. OLIVER P. FOSTER, administrator, defendant in error.

1. The leave of absence of counsel does not extend to any other cases than those in which he appears to be of counsel on the dockets of the Court.
2. Where a new trial was granted on an agreed state of facts, which judgment was reversed in this Court, it is competent for the movant to amend his motion before the judgment of this Court is made the judgment of the Superior Court, by showing that the facts were agreed to under a mistake as to their truth.
3. When a judgment has been *affirmed* on a statement of facts contained in the bill of exceptions, a different question might arise, but in this case the judgment was *reversed*, and the whole case was open for further investigation, and the truth may be shown.

Attorneys. Leave of absence. Practice in the Superior Court. Amendment. New trial. Judgment. Estoppel. Before Judge CLARK. Sumter Superior Court. October Term, 1872.

For the facts of this case, see the decision.

W. A. HAWKINS; N. A. SMITH, for plaintiff in error.

C. T. GOODE, for defendant.

WARNER, Chief Justice.

On the 21st day of December, 1867, the plaintiff brought his action against the defendant in the County Court of Sumter, on a receipt for ten bales of cotton, which the defendant

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was to return in like quality and weight, as specified in the receipt, which was dated 15th November, 1860. A trial was had in the County Court and a verdict rendered for the plaintiff for the sum of \$1,500 00, and a judgment entered thereon. After the adoption of the Constitution of 1868, abolishing the County Court, the records and papers appertaining thereto were transferred to the Superior Court, and at the April term, 1869, of the latter Court, a motion was made for a new trial in the case, on the grounds that defendant's counsel had leave of absence from the Court, and that the County Court was abolished at the time said verdict and judgment was rendered. The Court granted the new trial on the last ground, holding that the County Court was abolished in April, 1868, to which the plaintiff excepted, and brought the case to this Court. It appears from the original bill of exceptions in that case that it was agreed that the verdict in the County Court was rendered on the 20th day of July, 1868, and that the judgment was entered thereon on the 22d day of July, 1868. This Court held and decided that the Constitution of 1868 went into operation and took effect on the 21st day of July, 1868, and that the County Court was not abolished prior to that date, and reversed the judgment of the Court below, holding that, as it then appeared, from the statement of facts in the bill of exceptions, that the verdict was rendered on the 20th, before the Court was abolished, and the judgment entered on the 22d, after the Court was abolished, that it was the duty of the Superior Court to have entered a judgment on that verdict, unless some good and sufficient cause was shown other than the abolishment of the County Court on the 21st day of July, 1868: See *Foster, adm'r, vs. Daniel*, 39 *Georgia Reports*, 39. When the case was remanded back to the Court below, and before the judgment was entered on the verdict, the defendant amended his motion for a new trial, so as to show from the records of the County Court that the verdict was, in fact, rendered in that Court on the 22d of July, after the Court was abolished, and not on the 20th, and that fact does so appear from the records of that Court. The defendant also

offered the additional affidavit of Price, going to show that he would prove that the plaintiff's demand had been paid. The Court overruled the motion for a new trial, and the defendant excepted.

1. There was no error in overruling the motion on the ground of the leave of absence of the defendant's counsel, on the statement of facts contained in the record. The defendant had filed no plea, and his counsel had not marked his name to the case, and when it was called neither the Court nor the plaintiff's counsel knew that the defendant had any counsel in that case when the verdict was taken. The leave of absence of counsel by the Court cannot properly be said to extend to any other cases than those in which he appears to be of counsel on the dockets of the Court. It is not the business or duty of Courts to protect parties, or their counsel, from the consequences which result from their own negligence.

2. The fact that the verdict was obtained on the 20th of July, as stated in the original bill of exceptions, was evidently a mistake, as is now shown by the records of the County Court, and the question is whether the defendant was estopped from showing the truth of the matter when the judgment of the Court below was reversed, and before there was any judgment entered on the verdict. In our judgment, he was not concluded, on the statement of facts disclosed by the record, and that the Court below should have set aside the verdict and granted a new trial.

3. When a judgment has been *affirmed* on a statement of facts contained in the bill of exceptions, a different question might arise, but in this case the judgment was *reversed*, and the whole case was open for further investigation, and the truth may be shown.

Let the judgment of the Court below be reversed.

McAlister vs. The State of Georgia.

ALPHONSO J. McALISTER, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

1. On the trial of an indictment for the offense of shooting at another, the defendant proposed to prove that a short time after the shooting, there was, at a grocery near by, to which both defendant and prosecutor had gone just after the shooting had occurred, a considerable number of negroes who were excited and were threatening to mob the defendant. There was no evidence, nor was it offered to be proved that any such threat was made before the shooting, and in fact it appearing that the excitement must have been caused by the shooting and wounding of the prosecutor :

Held, That such testimony could not have illustrated the issue as to the guilt or innocence of the defendant for shooting at the prosecutor prior to any such excitement or threats as were proposed to be proved, and it was not error in the Court to reject such evidence.

2. The verdict in this case is sufficiently sustained by the evidence to justify the Court below in refusing a new trial on the ground that it was contrary to evidence.

New trial. Evidence. Threats. Before Judge HOPKINS.
Fulton Superior Court. October Term, 1872.

McAlister was placed on trial for the offense of shooting at another, alleged to have been committed upon the person of one Isham Bennett, in the month of March, 1871.

The defendant pleaded not guilty. The jury found to the contrary. A motion was made for a new trial upon the ground that the verdict was contrary to the evidence, and because the Court refused to allow the defendant to prove by Powell Owen, a policeman, and by Thrasher Kile, that a short time after the shooting they went to the house of Moses Calhoun, close to the place where the offense is alleged to have been committed, and within hearing of the shooting, to which house Bennett and the defendant had both gone after the shooting, and that there was a large number of negroes there, acting in a riotous manner, many of them intoxicated, and making threats of mobbing defendant.

The evidence strongly supported the verdict.

The motion was overruled and the defendant excepted.

HILL & CANDLER ; GARTRELL & STEPHENS, for plaintiff in error.

JOHN T. GLENN, Solicitor General, by Z. D. HARRISON, for the State.

TRIPPE, Judge.

1. We cannot see how the evidence which was ruled out by the Court could have illustrated the issue before the jury. The excitement and mobocratic spirit which were said to exist and which were proposed to be proven, must have occurred after the defendant had shot the prosecutor, and must have been produced by it. At least, no offer was made to prove that such a state of facts existed before the shooting, or that the defendant could have acted under the influence of fear or alarm caused thereby. To have made the testimony admissible, other facts should have been shown, either connecting the prosecutor with such threats, etc., or connecting them with the shooting, so as to make it appear that the doctrine of self-defense, or its equivalent, in law, could reasonably grow out of it, or be founded on such evidence. Nothing of this sort appeared, or was offered to be proved.

2. The evidence sufficiently sustains the verdict to forbid our interference.

Judgment affirmed.

THOMAS W. ALEXANDER *et al.*, executors, plaintiffs in error,
vs. JOHN W. MALTBIE, executor, and PHILADELPHIA
MALTBIE, executrix, defendants in error.

1. The tender of Confederate money in payment of two notes, one made in March, 1861, and the other in January, 1862, did not create such an equity as would authorize a jury to reduce a judgment for the full amount, under the provisions of the Relief Act of 1868.
2. Though the notes upon which said judgment was based may have been given for Georgia Railroad bank bills, yet a tender of Confederate money sufficient to purchase such bills will not create such an equity.

Alexander et al. vs. Maltbie.

Relief Act of 1868. Tender. Before Judge RICE. Gwinnett Superior Court. March Term, 1873.

The evidence showed that the defendants, in November, 1862, tendered to the plaintiffs' testator Confederate money sufficient to purchase Georgia Railroad bank bills for which the notes, on which the judgment was based, were given. This tender was refused.

For the remaining facts, see the decision.

J. N. GLENN; CLARK & PACE, for plaintiffs in error.

L. J. WINN; J. P. SIMMONS, for defendants.

WARNER, Chief Justice.

The plaintiffs instituted suit on two notes: the one dated 16th January, 1862, due one day after date, for \$425 00, the other note dated 28th March, 1861, for \$25 00, and obtained a judgment for the full amount due on the notes on the 14th September, 1867. In March, 1873, a motion was made to open and scale that judgment, under the provisions of the Relief Act of 1868. On the hearing of that motion, the jury, under the charge of the Court, found a verdict for the plaintiffs for the full amount of the judgment. The defendant's made a motion for a new trial, on the ground that the Court erred in its charge to the jury, which was overruled, and the defendants excepted. The Court charged the jury, in substance, that the tender or offer to tender Confederate notes in payment of the plaintiffs' debt, or the offer to do the other things, as set forth in the record, did not create such an equity as would authorize the jury to reduce the amount of the judgment. In view of the evidence contained in the record, we find no error in the charge of the Court to the jury, or in the refusal to grant a new trial.

Let the judgment of the Court below be affirmed.

JOHN K. McCARTER, plaintiff in error, *vs.* EDWIN A. TURNER *et al.*, defendants in error.

1. Where a plaintiff, in 1869, sued two joint and several makers of a promissory note, executed in 1863, due one day after date thereof, and after the 1st day of January, 1870, dismissed the action against one of the defendants and obtained a judgment against the other, there being no plea filed by the latter, such dismissal was not a discharge of the defendant against whom the judgment was rendered. If the party against whom judgment was obtained was a surety and the other was principal, the rule would be different.
2. On the hearing of a bill filed by such defendant, praying an injunction against the judgment and execution issued thereon, and one of the issues being whether the defendant, against whom the judgment was obtained, was the security of the party who was dismissed from the suit, the note not showing that fact, parol testimony is admissible to show what was the understanding and agreement of the parties to the note on that point, at the time of its execution.

Promissory notes. Joint and several liability. Principal and security. Evidence. Before Judge HOPKINS. DeKalb Superior Court. March Term, 1873.

On August 14th, 1869, McCarter brought complaint against Turner and one H. H. Weaver upon the following note:

"One day after date, we or either of us promise to pay to J. K. McCarter, or bearer, three hundred and fifty-five dollars and seventy-one cents, for value received. This March 11th, 1863.

(Signed)

"E. A. TURNER,

"H. H. WEAVER."

Weaver filed an issuable plea, under oath. Turner made no defense.

At the September term, 1870, the case was dismissed as to Weaver, and a judgment rendered by the Court against Turner. The execution based upon this judgment was placed in the hands of James Hunter, the sheriff of DeKalb county, for levy, when Turner filed his bill against McCarter and said sheriff, praying that they be enjoined from the enforce-

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ment of said execution against him. The complainant set forth the above stated facts, and further, that the order of dismissal as to Weaver was taken late in the term, without the knowledge or consent of Turner, and after he had left the Court; also, that he was only a security for Weaver, and that, by the dismissal of the case as to him, after January, 1870, he was discharged from all liability, and that such discharge operated as a release of complainant.

The answer of McCarter admitted the allegations of the bill, except as to Turner being a security on said note. The averments upon this point were expressly denied.

The jury returned a verdict in favor of the complainant, and a decree was entered accordingly. The defendants moved for a new trial, upon the following grounds, to-wit:

1st. Because the Court allowed complainant, over the objection of defendant, to show that at the time the note was made, it was understood with McCarter that complainant was to be the surety of Weaver.

2d. Because the Court erred in charging the jury, "that if the evidence satisfied them that Turner and Weaver made the note sued on by McCarter prior to the 1st of June, 1865, in which they were co-obligors; that this note was sued by McCarter against Turner and Weaver, and that after January 1st, 1870, McCarter dismissed the suit as to Weaver, and took judgment against Turner alone, then Turner was discharged from all liability to McCarter, and they should find that McCarter, be enjoined from the enforcement of the judgment thus rendered against Turner."

3d. Because the verdict was contrary to law and the principles of justice and equity.

The motion was overruled, and the defendants excepted upon each of the grounds aforesaid.

HILL & CANDLER, for plaintiffs in error, cited, as to the admissibility of parol evidence: Code, sec. 3138; 6 Ga. R., 65; 26 *Ibid.*, 427. As to release: Code, secs. 2712, 2811 42 Ga. R., 492.

L. J. WINN, for defendant, cited in support of the charge: Code, sec. 2811; Story's Prom. Notes, 425, 435; 1 Bouv. Ins., 307, 308; 42 Ga. R., 491.

TRIPPE, Judge.

1. We know of no authority going to the extent that if a creditor, holding a note on two joint and several contractors, brings suit against one only, and by his failure to join the other, or to sue him in a separate action, the debt is barred as against that other by the statute of limitations, that the party who is sued can, on that account, plead that he is released from liability. There is no provision in the statute giving the right to a mere co-obligor to order action to be brought, and on the failure of the creditor to obey, to claim a discharge.

If this right does not exist, and there be no power in him to direct the commencement of the action, we do not see how the fact of the creditor's dismissal of the suit as to one, even after the bar of the statute has attached, can give the claim of being released from the debt to the other. It is true if a creditor release one of two joint debtors, it operates as a release of the other: New Code, section 2862. But a release is always founded on some consideration moving the releasor thereto. If the claim of release is a mere promise, or without consideration, it can have no legal force. Merely not suing the one, whereby the statute discharges him, is not sufficient to discharge the other. It is the duty of each debtor in such a case to pay the debt, to pay it on its maturity. Whenever he does pay it, he has his right to demand contribution from his co-debtor. The creditor is under no obligation to him to procure a judgment through which he can the sooner obtain the reimbursement. Surely if one of the debtors be litigious, or contest the debt, whilst one has no defense, the latter has no claim on the creditor that he shall conduct the litigation, be put to the delay and expense of perhaps a long law suit for his benefit. Such were not the terms of the contract, nor is it the law of the contract.

2. But if the complaining co-debtor be a surety, and that fact be known to the creditor, the question is different. By express law the surety can give notice to the creditor and compel a suit within three months, or be discharged from the debt: New Code, section 2156. If the creditor were to bring action under such notice, and of his own motion dismissed it after the expiration of the three months, he could hardly claim that he had complied with the true intent and meaning of the law. Take, then, the case of a creditor who institutes suit against both principal and surety without notice to sue. Of course this puts the surety at his ease. He had the right, and a valuable right it is, to command the suit to be brought, without being forced to assert it, and by the voluntary act of the creditor he is relieved of the necessity of giving the notice. Can the creditor, in this state of the case, after the bar of the statute has attached, dismiss the principal from the suit? But we do not put this decision on the ground that the statute has attached to the debt, so as to prevent the security from recovering against his principal whatever he may pay in discharge of such debt. Indeed, in *Reid et al. vs. Flippen*, 47 *Georgia Reports*, page 273, it was held that the surety in such a case, would not be barred from suing his principal, although the statute would be a bar as between the creditor and the principal. The true reason of our holding is, that a creditor cannot, by voluntarily bringing suit, thus discharge the surety from the necessity of giving the notice, put him at ease and off his guard, and then, after the lapse of a considerable time, it may be after protracted litigation, suddenly, of his own motion, and without notice to the surety, dismiss the action as to the principal and claim the payment of the debt from the surety. It would be a legal cheat of the surety out of the protection the law gives to a favored class. Every right the law affords sureties it will strictly enforce. Their liability is *stricti juris*, and creditors must be astute not to infringe them.

A different ruling than the one we make, would give a creditor an unconscionable power over the rights of a surety, or the surety would be compelled, in the case of a suit being

voluntarily brought by the creditor, to do the surplus work of giving notice in writing to the creditor that he must not dismiss his action, even if that would be sufficient to protect him.

Upon the other question raised in this case, to-wit: When the note does not show the fact of suretyship, can the party claiming to be surety prove it by parol testimony? This has been so determined in two cases: *The Bank of St. Mary's vs. Mumford & Tyson*, 6 Georgia, 44; and *Higdon vs. Bailey et al.*, 26 Georgia, 426. We think these cases settle the question, and the testimony objected to by defendant in error was properly admitted by the Court. The charge of the Court was erroneous on the ground that it did not submit the fact to be determined by the jury whether Turner was or was not a surety. The evidence was conflicting on this point, and it is the controlling question in the case. The charge was, in substance, that if the plaintiff below sued Weaver and Turner on a note made before June, 1865, and after January 1st, 1870, dismissed the action as to Weaver, then Turner was discharged from liability. The jury should have been further instructed that to discharge Turner, it must further appear that he was security. On account of this omission, we are compelled to grant a new trial.

Judgment reversed.

WILLIAM T. ANDERSON, plaintiff in error, vs. HOWARD & SIMS, defendants in error.

1. Where H. bought a stock of goods from A., executing a mortgage on the same to secure the purchase money, and subsequently formed a copartnership with S., the latter agreeing to furnish goods equal in value to those put in by H., and goods were purchased by the firm and added to the stock on hand to supply the place of sales made: *Held*, That the purchases made by the firm of S. & H. to supply the deficiency made by sales from the stock originally bought from Anderson, are not subject to the execution issuing upon the foreclosure of the aforesaid mortgage.

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2. Where a mortgage is executed upon a stock of goods, some of which are subsequently sold and others purchased to supply their place, the mortgage lien attaches to the purchases made, to the extent of the value of the stock originally mortgaged.

Chattel mortgage. • Partnership. Before Judge ANDREWS.
Wilkes Superior Court. November Term, 1872.

For the facts of this case, see the decision.

W. M. & M. P. REESE, for plaintiff in error.

S. H. HARDEMAN, for the defendants.

WARNER, Chief Justice.

This was a claim submitted to the Court below, to determine the law and the facts without the intervention of a jury. The Court decided in favor of the claimant, whereupon the plaintiff excepted. It appears from the evidence in the record that Howard, on the 19th day of January, 1872, purchased a stock of goods of Anderson, and executed a mortgage to him on the goods, to secure the payment therefor. In the month of February, 1872, Sims & Howard formed a copartnership, the terms of which were, that Sims was to furnish goods equal in value to those put in by Howard, and to share equally in the profits. Subsequently, goods were purchased by the firm and added to the stock purchased by Howard from Anderson, as needed, according to the agreement of the parties, which goods were purchased in the name of Howard & Sims, and shipped to them, and paid for by them, except the amount of \$420 00, which remains unpaid. On the 18th of May, 1872, Anderson foreclosed his mortgage on the goods sold to Howard, and an execution was levied by the sheriff on all the goods found in the store-house on the 25th of May, 1872. On the 1st of June, 1872, Howard & Sims interposed their claim for certain specified articles of the goods levied on as the property of Howard, alleging that said specified goods were not the property of Howard, but were the property of the copartnership. The goods claimed are goods which were purchased by the copartnership firm, but the goods in the store were sold by

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the partners indiscriminately as well from the stock purchased by Howard from Anderson, as from the additional stock purchased by the copartnership firm; and the question is, whether the additional stock of goods purchased by the copartnership are liable to be sold to an amount equal to that of the goods sold by Howard, covered by Anderson's mortgage? In other words, can the goods purchased by the copartnership (a part of which are not paid for) be taken and sold as the individual property of Howard, to supply the deficiency in the goods sold, which were covered by his individual mortgage to Anderson? The 1941th section of the Code declares, that a mortgage may cover a stock of goods, or other things in bulk, but changing in specifics, in which case the lien is lost on all articles disposed of by the mortgage up to the time of foreclosure, and attaches on the purchases made to supply their place. Now, it is undoubtedly true that if Howard, the mortgagor, had disposed of a part of the goods covered by his mortgage to Anderson, and had purchased and paid for other goods to supply the place of those disposed of, that the mortgage lien would attach to the goods so purchased to the extent only of the value of the original stock mortgaged: *Chisholm vs. Chittenden & Company*, 45 *Georgia Reports*, 213. But in the case now before the Court, the additional stock of goods levied on was not purchased by Howard, the mortgagor, but was purchased by Howard & Sims, a different and distinct party in contemplation of the law, who have never executed a mortgage upon any goods, so far as the record shows, and we cannot suppose that it was intended by this section of the Code, to create a lien upon goods purchased by third persons who were no parties to the mortgage. The goods covered by the mortgage were the individual property of Howard, the mortgagor; the goods claimed are the property of Howard & Sims, a different and distinct party in contemplation of the law. The Court passed its judgment upon the facts as well as the law, including the question of fraud, and it is to be considered in the light of a verdict of the jury.

Let the judgment of the Court below be affirmed.

The Mayor and Aldermen of Savannah vs. Waldner.

THE MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH,
plaintiffs in error, vs. GEORGE V. WALDNER, defendant in
error.

1. It is the duty of a municipal corporation, vested by law with authority over the streets, whilst dangerous works, such as sewers, etc., are being constructed across a street, to have proper precautionary measures taken to prevent accidents to passengers during such construction, whether the same is being done by the corporation through its own servants, or by contract, or by sub-contractors under a primary contractor. Such duty, at least, in the cases of independent contractors or sub-contractors is not founded on the principle of *respondet superior*, but is deducible from the authority in the corporation over the streets and the obligation flowing therefrom to protect the public against nuisances or dangerous obstructions in the highways of the city.
2. In an action by a plaintiff against a corporation for damages caused to his person and property on account of the default of defendant under the foregoing rule, it was error in the Court to charge the jury; "that in estimating the damages they could take into consideration the expenses to which plaintiff had been put in and about his said suit," there being no proof of what such expense was, and such expenses are only recoverable "when the defendant has acted in bad faith, or has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense."

Municipal corporations. Streets. Damages. Expenses.
Charge of Court. Before Judge SCHLEY. Chatham Superior Court. January Term, 1873.

George V. Waldner brought case against the Mayor and Aldermen of the City of Savannah for \$16,000 00 damages, alleged to have been sustained by him by reason of the negligent conduct of the defendant in not keeping Whitaker street in good repair at its intersection with Hall street, and in leaving open a ditch or sewer across the street first aforesaid at said point of intersection, into which, on the night of December 5th, 1871, the plaintiff and his horse were precipitated, to his great damage. The defendant pleaded not guilty.

The evidence made substantially the following case:

On the night of December 5th, 1871, the plaintiff was re-

turning home from his business, on horseback, through Whitaker street, one of the public highways of the city. His horse started, stumbled and fell into a sewer which was opened across the street, some eight or nine feet deep. Before the accident, his horse was worth \$250 00; he was subsequently sold at auction for \$50 00. The plaintiff was injured both externally and internally. Previous to the accident he was a hearty, strong man; since, his health has been very much impaired. He believes this result to be attributable to the injuries he then sustained. There were no lights placed at the opening to warn persons passing.

The contract to build this sewer had been let out by the defendant to Charles Van Horn. He had sub-let the job to McCrohan & Kirlin, who were engaged in doing the work at the time of the accident. The contract stipulated that the work should be done under the supervision of the city surveyor to see that the contract was complied with. It contained no provision to the effect that the contractors should erect lights at night.

The contest was as to whether the defendant, or the contractors doing the work, were liable to the plaintiff, and therefore much of the evidence is omitted.

The defendant requested the Court to charge the jury as follows :

1st. "That the doctrine of *respondeat superior* applies only where the relation of master and servant exists; if, therefore, the jury find under the evidence that McCrohan and Kirlin were not the servants of the city, that the city is not responsible."

2d. "That sub-contractors are not the servants of the superior; if, therefore, the jury find under the evidence that McCrohan and Kirlin were sub-contractors, the city is not liable.

3d. "That public officers in the discharge of a public duty are not responsible for the negligence and omissions of those employed by them.

4th. "That the Mayor and Aldermen in ordering the con-

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struction of a sewer in the street, though it may be for the time being an obstruction of the street, it is not a violation of their duty to keep the streets in repair.

5th. "That a municipal corporation is not liable for the misfeasance, negligence or omissions of those employed by it.

6th. "That the duty of putting up lights is a duty imposed upon the persons making the excavation, and not upon the city employing them.

7th. "If the jury find that the injury was occasioned by the stumbling of the horse, and not because there were no lights, the city is not liable."

The Court proceeded to charge the jury, and referring to each request separately, refused to give it in charge. The jury rendered a verdict for the plaintiff for \$2,000 00. The defendant moved for a new trial on the following grounds:

1st. Because the Court erred in refusing to charge as requested in the first, second, third, fourth, fifth, sixth and seventh requests to charge.

2d. Because the Court erred in the reason given for his refusals to charge as requested, that reason being that the city could not delegate its right, power and duty to keep the street in repair, there being, it is respectfully submitted, no such delegation of right, power and duty involved in the law or the facts of this case.

3d. Because the Court erred in saying to the jury that perhaps if there had been lights the horse would not have stumbled, this in reply to the seventh request to charge, which was, that if the jury should find under the evidence that the injury was occasioned by the stumbling of the horse, and not because there were no lights, the city would not be liable. The plaintiff in error submits that this was an expression of opinion on the evidence, which is error.

4th. Because the Court erred in instructing the jury that in estimating the damages they could take into consideration the expense to which plaintiff had been put in and about his suit, thus leaving the jury to find a fact in regard to which there was not a particle of testimony.

The motion was overruled and a new trial refused. Whereupon the defendant excepted upon each of the grounds aforesaid.

W. B. FLEMING, for plaintiff in error.

THOMAS R. MILLS; RUFUS E. LESTER, for defendant submitted the following brief:

1. The city of Savannah is charged with the duty of keeping the streets in safe condition and of abating nuisances therein: See Code, sec. 4751; Mayor and Aldermen *vs.* Cul-lens, 38 Ga., 346; Savannah, Albany and Atlantic & Gulf R. R. *vs.* Shields, 33 Ga., 614; Shearman & Red. on Neg., sec. 133; Chicago *vs.* Robbins, 2 Black, 422; Storrs *vs.* Utica, 17 N. Y., 105; 3 Selden, 497.

2. The digging of a sewer, though a lawful act, and authorized by law, becomes a public nuisance, unless reasonable means be adopted for the safety of the public. To leave an open sewer in a street in a populous city is to neglect the public safety, unless lights or guards, or other means of safety or protection be adopted to warn against the danger: See Storrs *vs.* Utica, 17 N. Y., 105; Robbins *vs.* Chicago, 2 Black, 418; 4 Wall; Shearman & Red. on Neg., end of sec. 84. City requires lights, etc., from the citizen who digs sewers in the city: City Ordinances 1871, p. 472; 14 Barbour, 113.

3. For injuries sustained by such negligence, the party suffering the injuries is entitled to damages. It is contended on the other side that the work was put out by contract, and that where work is let out to an independent contractor, the party for whom the work is being done is relieved from responsibility for negligence. We reply: 1st. The contract does not make it the duty of McCrohan & Kirlin to adopt these means for the public safety, such as lights, fencing, etc., by night; they are, therefore, only responsible, if at all, for the safety of passers by whilst actually present and engaged in the work: See Buffalo *vs.* Holloway, 14 Barbour, 101-113; Storrs *vs.* Utica, 17 N. Y., 105; Shearman & Red. on Neg., sec. 83,

note (1.) One cannot escape from an obligation imposed upon him by law by engaging for its performance by contract: *Shearman & Red. on Neg.*, sec. 84. 2d. It is admitted that by the terms of the contract, the city reserved the right of supervising the work, and reserved certain rights over the contractors. This makes the relation of McCrohan & Kirlin that of servants, not contractors: See 5 *Ellis & Blackburn*, 115. 3. If McCrohan & Kirlin really were contractors and not servants of the city, plaintiff in error is still responsible.

1st. Because McCrohan & Kirlin were not charged by the contract with the duty of putting up lights or otherwise guarding the public safety: See *City of Buffalo vs. Holloway*, 3 *Seldon*, 493; 14 *Barbour*, 114 and 113; *Shearman & Red. on Neg.*, sec. 83 and 84. Nor could this duty have been imposed on contractors so as to relieve the city from injuries done the public: *Storrs vs. Utica*, 17 *N. Y.*, 105.

2d. Because the defect, *i. e.* the sewer, which occasioned the injury, was the direct result of the act which the contractor was employed to do. When the injury is the direct result of the act which the contractor is employed to do, the employer is liable to injured party: *Lowell vs. B. & L. R. R.*, 23, *Pickering*, 31; *Hole vs. S. & S. R. R.*, 6; *Hurlstone & Nor.*, 495; *Robbins vs. Chicago*, 4 *Wallace*, 678 and 679; *Storrs vs. Utica*, 17, *N. Y.*, 104, (overruling and explaining *Blake vs. Ferris*, *Pack vs. Mayor*, etc., and *Kelly vs. Mayor*, etc.) pages 104 to 109.

If we are correct in our argument that the city cannot delegate, by contract, the duty of keeping the streets in repair and safe condition, so as to relieve themselves from liability for injuries done, then the 1st and 2d of requests to charge in Court below were entirely irrelevant and immaterial and properly refused, and the verdict ought to have been the same. Although a request to charge be pertinent and legal, yet if the verdict as rendered does substantial justice, a new trial should not be granted: See *Ga. R. R. & Bkg. Co. vs. Scott*, 37 *Ga.*, page 94.

For a Judge to assume a fact to be true which is not con-

troverted, is not a violation of section 3183 of the Code of Georgia: See *Whitty vs. the State*, 38 Ga., 50; *Phillips vs. Williams*, 39 Ga., 597; 16 Ga., 368. (*Marshall vs. Morris*) construing Act of 1850—Cobb's Digest, 462—the Statute of 1850 is precisely the same as section 3183 of the Code. (It was conceded that there were no lights, and the expression of the Judge was merely a reason or illustration of the impropriety of the request to charge.)

Admitting, for sake of the argument, that the doctrine of *respondet superior* does not apply in this case, still the right exists in this case against the city, because the wrong complained of does not consist in a violation of duty on the part of the contractor, but in a violation of duty on the part of the city in not keeping the streets free from nuisance and safe for travel, which was not within the scope of the employment of the contractor: *Parker vs. the Mayor, etc.*, 39 Ga., 725.

TRIPPE, Judge.

1. The municipal authorities of the city of Savannah are by law vested with authority over the streets in the city, and with power to remove all nuisances, obstructions or erections, of any kind, along or upon any street, lane, way or place therein: New Code, section 4849. From this authority arises the obligation on them to keep the streets in a safe condition for public travel and use, and the consequent liability to a civil action by any person specially injured by neglect to discharge this specific duty: Dillon on Municipal Corporations, section 789. The same author, in his able and elaborate work on that subject, further says, in section 791, this duty "rests primarily as respects the public upon the corporation, and the obligation to discharge it cannot be evaded, suspended, or cast upon others by any act of its own." It has never been doubted but that the corporation is liable for injuries produced by the unsafe condition of the streets, and which were rendered so by its direct act or authority, when it was not acting through independent contractors: 39 Barb., 329; 1 Seld., 369; 4 Wall, 189. So, also, for neglect to keep the streets

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in repair, even by the removal of dangerous defects occasioned by the wrongful acts of others : 39 Barb., *supra*, 9 N. Y., (5 Seld.,) 456 ; 2 Black, 422 ; 5 Dutcher, 544. It is true that this last position is qualified, and properly so, by the condition that in such cases it is necessary to show that the corporation had notice, or that the circumstances were such as to charge it with notice of the defect which caused the damage. This principle is essential to secure the safety of the streets and the protection of the public. Were it not so, there would be no guaranty for the repair of any defect or the removal of any obstruction, however dangerous, which any trespasser might wantonly place in the streets. If such a trespasser were to dig a dangerous excavation in or across a street, he, it is true, might be liable for damages caused thereby. But it would be of little satisfaction to the public to feel that they could only have recourse on some private party, probably insolvent, possibly unknown. The only reasonable and safe rule is, as has been so often held, that the duty resting on the corporation to keep the streets safe and in repair, carries with it, inevitably, the obligation to protect the public against danger from such obstructions by their removal, or by abating them with reasonable diligence. If this be so, does it not furnish a test to determine the whole question as to the liability of the corporation in this case? Granting that the corporation did not sustain to the primary contractor, Van Horn, or to the sub-contractors, McCrohan & Kirlin, the relation of principal and agent, or of master and servant, still it may be liable. This concession may, of course, yield the question that its liability could be rested upon the principle of *respondet superior*. Yet that does not necessarily relieve the city from responsibility. For if the corporation is liable for negligence in not protecting the public against dangers caused by a wrong-doer, why should it be excused from negligence in permitting dangerous obstructions created, at least, by its authority, though it may be by independent contractors, to hazard the safety of the street traveler.

Suppose the independent contractor to make a sewer across

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a street, were only partially to execute the work, should dig a deep excavation in the street and abandon the job. Or suppose, by accident or death, after doing that much work, he could do no more. What would be the duty of the city? Could it remain inactive and leave the excavation open until the representative of its independent contractor could be appointed, after, it might be, a considerable lapse of time, and claim immunity because the work was not being done by its own servant or agent, for whose default it could only be held responsible? No one would contend that such is the law. Still less could it be maintained that, in the case of an abandonment of the work by the contractor, the corporation had the right to permit it to remain permanently in the condition it was left. It will be admitted at once that it would be the duty of the proper authorities, with due diligence, to have the work completed by a new undertaking, or to have the excavation filled without delay. How, then, can it be said that a corporation may, by engaging a contractor who is not subject to its authority and control, be relieved from its liability, and permit the public to be exposed to dangerous obstructions placed in the streets and negligently left, without proper barriers or signals to give warning to those who may be compelled to travel the streets?

The duty and liability resting on a municipal corporation in such cases is deducible from the authority vested in it over the streets, and the obligation flowing therefrom, to protect the public against nuisances or dangerous obstructions in the highways of the city. And Judge DILLON, in his work already quoted, says, in section 792, that the doctrine of *respondet superior* does not apply where the contract directly requires the performance of a work intrinsically dangerous, however skillfully performed. In such a case, the party authorizing the work is justly regarded as the author of the mischief resulting from it, whether he does the work himself or lets it out by contract. To the same purport are also the decisions in 17 New York, 104; 7 New York, (3 Selden,) 493, and in numerous other cases.

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*In *Parker vs. The Mayor and Council of Macon*, 39 Georgia, 725, it was held that, under the power conferred on Mayor and City Council over the streets, lanes, etc., they are bound to keep them in such condition that it is safe and convenient to pass them, and in case of failure, they are liable to any person injured by their neglect. In the same case, it was further held that they were liable to a person injured by the fall of a high brick wall of a burnt house, on private property at the line of the sidewalk, if they were negligent in the discharge of their duty to have the wall abated or made secure.

Upon principle and authority, we hold that if the builder of the sewer in this case, negligently left it unguarded, by not having proper barriers, or lights, or other protection against danger, and it was so permitted to continue for an unreasonable or unnecessary time by the municipal authorities, who had notice, or there are facts from which notice could be reasonably inferred, they are liable for injuries resulting from such neglect to perform their duty. This general principle covers all the questions raised in the motion for a new trial touching this question, and it is not, therefore, necessary to notice them in detail.

2. We think the Court erred in the charge to the jury saying, "that in estimating the damages, they could take into consideration the expenses to which plaintiff had been put, and about his suit." There was no evidence of what was the expense. If any, it could have been shown what it was. Plaintiff cannot claim for what is capable of almost any proof, without furnishing the jury some testimony to ascertain at the measure or amount of the claim. Proof of what was the physician's bill, and other expenses growing out of damages received, is always required to entitle a recovery therefor. So it should be as to the expenses referred to in this paragraph in the charge. Such expenses are only recoverable "when the defendant has acted in bad faith, or has been stubbornly obstinacious, or has caused the plaintiff unnecessary trouble and expense." New Code, section 2942. As it is impossible to show how this charge may have affected the amount given in

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verdict, and as it was calculated to, and probably did, cause the jury to increase the amount of damages rendered, we are compelled to order a new trial, and to reverse the judgment of the Court refusing it.

Judgment reversed.

JAMES F. DEUPREE *et al.*, executors, plaintiffs in error, *vs.*
LUCY Y. DEUPREE *et al.*, caveators, defendants in error.

1. It is error for the Judge of the Superior Court, in his charge to the jury, to express or to intimate his opinion as to what has or has not been proved.
2. The discretion of the Superior Court in granting a new trial upon the the ground that the verdict is contrary to the evidence, will not be interfered with unless abused.

Charge of Court. Opinion on evidence. New trial. Before Judge ANDREWS. Oglethorpe Superior Court. April Term, 1873.

This is the second time this case has been before the Supreme Court: See 45 *Georgia Reports*, 415.

For the facts, see the decision.

C. PEEPLES; W. M. REESE; A. H. STEPHENS; JOHN C. REED, for plaintiffs in error.

R. TOOMBS; B. H. HILL & SON; J. D. MATHEWS; LUMPKIN & OLIVE; W. G. JOHNSON, for defendants.

WARNER, Chief Justice.

This case came before the Court below on a caveat filed to the will of Lewis J. Deupree, which was propounded for probate and record. The only question involved on the trial was whether the testamentary paper offered in evidence by the propounders, bearing date 24th of May, 1864, was subscribed by the attesting witnesses in the presence of the testator, as re-

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quired by the 2379th section of the Code. The jury, under the charge of the Court, found a verdict in favor of the propounders setting up the will. A motion was made for a new trial, on the ground of error in the charge of the Court to the jury, and also on the ground that the verdict was decidedly and strongly against the weight of the evidence. The Court granted a new trial in the case on the last ground, as set forth in its judgment; whereupon, the propounders excepted. The Court charged the jury, that "the Supreme Court held in this case, that there is no question as to the general rule, that on the death of the witnesses or failure of their memory, the proof of the fact of execution begets a presumption that all the details of the fact were such as the law requires, and the caveators request me, therefore, to charge that the failure must have been on account of death or defect of memory. If the case required, I would say that if the failure of the witnesses to prove the legal execution of the papers for other causes than memory or death, the presumption would arise, but the Supreme Court apply the general rule to this case and to the facts, so far as this point is concerned, and Judge McCAY said that, for his part, the witnesses to the will do fail to remember what was the real truth of the case. And if the presumption was begotten on the facts of the last trial, they are here." This charge of the Court was error, and a new trial should have been granted by the Court below on that ground.

1. The 3183d section of the Code declares that it is error for any or either of the Judges of the Superior Courts of this State, in any case, whether civil or criminal, or in equity, during its progress or in his charge to the jury, to express or intimate his opinion as to what has or has not been proved, or as to the guilt of the accused; and should any Judge of said Court violate the provisions of this section, such violation shall be held by the Supreme Court to be error and the decision in such case reversed and a new trial granted in the Court below. The point in the case, on the trial in the Court below, was whether the subscribing witnesses to the testamentary paper failed to recollect whether the testator was present

at the time they attested the same, or whether their evidence affirmatively proved that he was absent. The Court charged the jury, that the Supreme Court apply the general rule to this case and to *the facts*, so far as this point is concerned, and Judge McCAY said that, for his part, the witnesses to the will do fail to remember what was the real truth of the case, and if the presumption was begotten on the facts of the last trial, it is here—that is to say, the Court told the jury, in effect, that the evidence showed that the attesting witnesses did fail to remember whether the testator was present at the time of their attestation of the testamentary paper, and that the Supreme Court, or at least one of the Judges thereof, had so said, and if such was the fact on the former trial, it is so here at this trial, not only expressing his own opinion as to what the evidence proved the facts to be, but fortified that opinion by telling the jury that the Supreme Court, or one of the Judges thereof, said the same thing in relation to the evidence in the case. What makes the charge of the Court the more conspicuously erroneous is that the facts were not the same on the last as on the former trial. We think the Court also erred in charging the jury as to the admissions of the caveators as to the presumptions of law, from the evidence, there not appearing to have been any such admissions made. As this case must be remanded for a new trial, we express no opinion in relation to the other grounds of error contained in the record, as to do so would necessarily involve a discussion of the facts which the jury should be left entirely free to consider on the next trial, without any expression of opinion in relation thereto by this Court.

2. In relation to the ground on which the Court below granted the new trial, if there had been no errors of law committed, we should not, according to the repeated rulings of this Court, have controlled his discretion in doing so, or if it had refused a new trial on that alleged ground of error, we would not have interfered with the exercise of the discretion of the Court on the facts, as contained in the record.

Let the judgment of the Court below be affirmed.

Strupper *vs.* King.

IGNAZIO G. STRUPPER, plaintiff in error, *vs.* JOHN KING,
defendant in error.

1. Where N., in the presence of B., deposited a cotton receipt of B. with K. to hold for N. as collateral security for a debt due by B. to N., it is not competent on the trial of a garnishment against K., sued out on an attachment against S., to prove by the sayings of B. that the debt for which the deposit was made as collateral, was an account made by B. with S. Nor was the answer of B. to a summons of garnishment served upon him in the same case, admissible to prove that fact.
2. There was no evidence in this case connecting S. with the transaction out of which accrued the debt on B., or showing how it was contracted, so as to authorize any charge to the jury on the ground of the debt on B., or the collateral security having been fraudulently transferred by S. to N.

Garnishment. Evidence. Charge of Court. Before Judge JOHNSON. Muscogee Superior Court. October Term, 1872.

Ignazio G. Strupper sued out an attachment against Samuel Lovinger for \$750 00, and had the same levied by serving summons of garnishment upon John King and W. A. Barden & Company. King answered, denying having any assets of Lovinger's in his hands. His answer was traversed. Barden & Company answered as follows :

"In answer to the summons of garnishment in the above case respondents say : That W. A. Barden & Company bought a bill of goods amounting to the sum of \$500 00, from S. Lovinger, due January 1st, 1870, and respondents turned over to said Lovinger eight bales of cotton at said time as collateral security for the payment of said sum, of the value of \$600 00; and respondents have never received anything on account of said cotton; and respondents say that said cotton was held by said Lovinger until about the 30th of November, 1870; and they say that they gave said Lovinger notice to sell said cotton in January, 1870, when the same was worth \$600 00; but that said Lovinger refused to have said cotton sold until about the 30th of November, 1870, when the same sold for \$401 00, which same is in the hands of John King, the agent of said Lovinger. Respondents say that they are not other-

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wise indebted to said Lovinger, nor were they at the time of the service of said garnishment, nor have they any effects of said Lovinger in their hands, nor did they have at the time of the service of said summons of garnishment."

Judgment by default was rendered against Lovinger on the attachment. Upon the trial of the issue formed by the traverse of the answer of King, the following evidence was introduced:

King testified, that Samuel Lovinger had been a merchant in Columbus up to the winter of 1869-1870; that then some disposition was made of his stock, and his brother, N. Lovinger, took it in hand; that early in the year 1870, W. A. Barden & Company deposited with witness a receipt for eight bales of cotton, and that at that time said N. Lovinger, with Barden, had an interview with witness, and Lovinger said to witness that said receipt for said eight bales was to remain deposited with witness as collateral security for a debt owing him, N. Lovinger, by said Barden & Company, and gave witness to understand that that debt was a note for about \$500 00. Does not know that said debt was for goods Barden & Company had bought from Samuel Lovinger. It was not so stated at said interview. Never heard until afterwards that said indebtedness was a debt of Barden & Company for goods bought of S. Lovinger. Thinks that the next day both S. and N. Lovinger were missing, and have not been heard from since. That he knew they were about to leave.

In answer to question of counsel for the garnishee, witness said: "That after said interview, said Barden said that the debt for which said cotton was collateral was a debt for goods bought by his said firm of Barden & Company from S. Lovinger."

Upon motion of the garnishee this answer was excluded over the objection of plaintiff.

Plaintiff tendered in evidence the answer of Barden & Company to garnishment served on them. This answer was, on objection, excluded.

Raphael J. Moses testified, that as trustee for the creditors of S. Lovinger, he came out from New York to Columbus in the winter of 1869-'70, and a settlement was had, whereby N.

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Lovinger, who had been in the store with his brother, S. Lovinger, agreed to pay, and did pay, to said trustee, in behalf of said creditors, the sum of \$10,000 00, and was to have all the goods, accounts, etc., of said S. Lovinger; that immediately afterwards said N. Lovinger rapidly sold out the goods, and both S. and N. Lovinger ran away; that he, witness, was consulted as attorney by the parties in said transaction, and while the negotiation was pending the question of the rent of the store came up, and it was agreed by both S. and N. Lovinger that said rent should be paid out of the property of S. Lovinger, so transferred to said N. Lovinger.

The Court charged the jury: "If N. Lovinger, Barden being present, deposited with King, the garnishee, the cotton receipt for eight bales of cotton, from the sale of which, afterwards, the money in the hands of the garnishee arose, as collateral security for a debt due him, said N. Lovinger, from Barden & Company, the owners of the cotton, then the jury could not, in this proceeding, inquire whether or not said S. and N. Lovinger, in the transfer of said debt, if any transfer there was to N. by said S. Lovinger, had committed a fraud upon the creditors of said S. Lovinger."

The jury found for the garnishee. The plaintiff moved for a new trial, alleging as grounds:

1st. The ruling of the Court, rejecting said testimony of King.

2d. The ruling of the Court, repelling as evidence said answer of garnishees, Barden & Company.

3d. Because said verdict was decidedly and strongly against the weight of the evidence.

4th. Because said verdict was contrary to evidence and the principles of justice and equity.

5th. The said charge of the Court.

The Court overruled the motion for a new trial, and plaintiff excepted.

MOSES & DOWNING, for plaintiff in error.

PEABODY & BRANNON, for defendant.

TRIPPE, Judge.

1. If the answer of the witness King, had shown that the statement made by Barden was so made in the presence of N. Lovinger, then it would have been relieved of one of the objections to it. The object of the plaintiff, in desiring the answer was, doubtless, to connect Samuel Lovinger with the debt on Barden, and thereby raise the question of fraud in the transfer of the debt by S. Lovinger to N. Lovinger. If this issue could have been made in this case, and we do not say it could not, then it would have been for the purpose of defeating the rights of N. Lovinger. This could not have been done by hearsay. What Barden may have said to King, the bailee, in the absence of N. Lovinger, could not have affected his rights. Barden was a competent witness, and his testimony, not statements, were the only competent evidence. The same principle would also exclude the answer of Barden & Company to the summons of garnishment served on them. That answer could have been legally used in an issue to which they were parties, but not in the one in which it was tendered.

2. Complaint is made that the Court charged, that in this proceeding the jury, "could not inquire whether or not S. and N. Lovinger, in the transfer of said debt, (if any transfer there was to N. by said S. Lovinger,) had committed a fraud upon the creditors of said S. Lovinger." Whether the Court was or was not correct in this charge, was wholly immaterial, under the evidence. There was no testimony, and none that was competent was offered, to show that N. Lovinger had any connection with the debt on Barden—none showing with whom it was contracted, or that S. Lovinger ever owned it. This being so, the evidence made no issue of fraud, and the jury, of course, could not consider it.

Judgment affirmed.

Renew vs. Darley et al.

TIMOTHY RENEW, plaintiff in error, *vs.* **CHARLES S. DARLEY et al.**, defendants in error.

1. On August 10th, 1859, a verdict was rendered in favor of B. and wife against R. "for the premises in dispute, and \$200 00 for rent," on a bill filed by B. and wife against R., claiming one undivided half of a certain lot of land, to-wit: one hundred and one acres. Upon this verdict a decree was entered in favor of the complainants for fifty-one and a half acres off the southeast corner, and fifty-one and one-half acres off the northwest corner of said lot, also for the rent, and directing the sheriff to place the complainants in possession. An attempt was made to divide the lot in accordance with this decree, but R. objected, as it interfered with his possession which he had held for many years under his deed, and under a division had between him and B. and wife many years before the filing of said bill. Nothing more appears to have been done towards the enforcement of said decree, except that R. paid the \$200 00 for rent and abandoned all that part of the land which B. and wife claimed under the original division. On February 2d, 1870, a writ of possession was ordered to be issued on said decree to put one S., who was not a party to the same, in possession of the southeast corner of said lot. R. filed his bill to reform said decree and to enjoin said writ of possession. The Court charged the jury that if R. knew of the decree, he had delayed too long in filing his bill to reform the same, to be allowed the relief prayed for. This charge was error.
2. The statute of limitations applicable to bills of review was suspended from November 30th, 1860, to July 21st, 1868.
3. The jury cannot, by their verdict, enjoin the complainant, where no cross-bill has been filed by the defendant containing a prayer therefor.

Equity. Bill of review. Statute of limitations. Before Judge CLARK. Sumter Superior Court. April Term, 1873.

For the facts of this case, see the decision.

JOHN R. WORRILL, for plaintiff in error.

HAWKINS & HAWKINS, for defendants.

WARNER, Chief Justice.

This was a bill filed by the complainant against the defendants, in the nature of a bill of review, to reform a decree rendered on the equity side of the Court in the county of Sumter,

for error apparent on the face of the record and decree. The bill is imperfectly drawn, but the object of it is to have the decree rendered against the complainant in 1859 reformed and its execution enjoined. On the trial of the case, the jury found a verdict in favor of the defendants and a perpetual injunction against the complainant. A motion was made for a new trial, on the several grounds set forth in the record, which was overruled, and the complainant excepted.

It appears from the evidence in the record that in the year 1832, the complainant purchased from the drawer thereof, lot of land number twenty-seven in the twenty-seventh district of Sumter county, and during the same year he sold one-half of said lot to Butler, as trustee for his wife, Mary, and the parties went into the possession of the same and divided the land, by agreement, between them—that is to say, complainant should have seventy acres in the northeast corner of the lot, and thirty acres in the southwest corner thereof, and Butler was to have seventy acres in the northwest corner of said lot, and thirty acres in the southeast corner thereof, which division was marked off by the parties, and the lines so marked are visible at the present time. Both parties built and made improvements on their respective portions of the land, and Butler, after residing on his part of the land for about ten years, moved away and left the same in charge of and under the control of complainant, as a friend, to manage the land for the benefit of his wife, the parties being brothers-in-law. Some time after Butler and wife left, the part of the land claimed by them was levied on and sold for Butler's debts and purchased by complainant, who claimed it as his own. In 1853, Mrs. Butler, by her husband as her next friend, filed a bill against the complainant to set aside his title acquired at the sheriff's sale. In that bill she claimed one undivided half of the lot, to-wit: one hundred and one acres, as appears on the face of her bill. There is no allegation therein as to any particular portion of the lot which she claimed. On the trial of that bill, the jury found a verdict in favor of the complainant for the premises in dispute and \$200 00 for rent.

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Upon this verdict, the complainant's counsel, for Butler and wife, entered a decree that the complainant do have and recover of the defendants the one hundred and one and one-fourth acres of land, being the one-half of lot number twenty-seven in the twenty-seventh district of Sumter county, being fifty-one and one-half acres off the southeast corner, and fifty-one and one-half acres off of the northwest corner of said land; that the sheriff of said county do put the complainant or his legal agent in possession thereof, and that complainant do recover \$200 00 for rent, etc. This decree is dated 10th August, 1859. It appears from the evidence that an attempt was made to divide the lot by running lines thereon, in accordance with this decree, but the complainant, Renew, objected, as it interfered with his possession, which he had held for many years under his deed, and the division of the lot between him and Butler and wife, before referred to; and nothing more appears to have been done towards its enforcement, except that Renew paid the \$200 00 for rent and abandoned all that part of the land which Butler and wife claimed under the original division thereof.

It also appeared from the evidence that Butler and wife had recognized the division of the land, as contended for by Renew, the complainant, in a letter written to him in 1869. On the 2d February, 1870, a writ of possession was ordered to be issued on the decree, dated 10th August, 1859, to put Sullivan in possession of the southeast corner of said lot, who is not a party to said decree; whereupon, the complainant, Renew, filed his bill, praying for a reformation of the decree in favor of Butler and wife, and to enjoin the execution of the writ of possession in favor of Sullivan. It also appears, from the evidence in the record, that the complainant, Renew, cannot either read or write.

It further appeared, in the progress of the trial, that a deed executed by Sullivan to Pilcher for the land claimed by Butler and wife, under the decree, had been offered in evidence and was ruled out by the Court, and then was allowed to go out with the jury, with the other papers in the case, when

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they retired to make up their verdict—whether by mistake or otherwise, does not appear. The Court charged the jury that if complainant knew of the decree, he had delayed too long in filing his bill to reform said decree to be allowed the relief prayed for.

1. This charge of the Court, in view of the facts of this case, was error. The complainant was illiterate, could neither read nor write, and, although he may have known that there had been a decree rendered, he may not have known the terms of it, and, therefore, the charge of the Court should have been, not if he knew of the decree only, but if he also knew *the terms of it*.

2. Besides, if he did know of the decree and the terms of it, he was not too late, in our judgment, inasmuch as the statute of limitations applicable to bills of review was suspended from the 30th of November, 1860, until the 21st July, 1868. What effect the deed from Sullivan to Pilcher may have had on the minds of the jury, we cannot know.

3. By what authority of law or principles of equity the jury found a verdict enjoining the complainant when no cross-bill had been filed containing such a prayer therefor by the defendant, we are not advised.

Let the judgment of the Court below be reversed.

JOHN S. DAVIDSON, administrator, plaintiff in error, vs. NEWBOLD LAWRENCE, assignee, defendant in error.

Where a grantee in a deed, executed in 1849, absolute on its face, but the grantor remaining in possession of the property, filed a bill in 1871 against the administrator of the grantor, alleging that there was a parol trust attached to the contract under which the deed was made, to-wit: that it was a transfer of the property in trust for the payment of a debt due the grantee and others by account, and the prayer of the bill was for a decree that the land should be sold and so appropriated:

Held, That under the allegations in the bill and the proof at the hearing, complainant was not entitled to any greater rights than a mortgagee would have where the mortgagor remained in possession, or than if

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the debt had been by a security under seal : and he is barred by the Act of March 16, 1869, in accordance with the decision made during the present term in the case of *John George vs. James Gardner*.

Statute of limitations. Trust. Debtor and creditor. Before Judge GIBSON. Richmond Superior Court. October Term, 1872.

Lawrence filed his bill against Davidson, administrator of Francis C. Taylor, deceased, making substantially the following case :

Taylor was in the year 1848 indebted to complainant, to one Norman Dart, since deceased, and to others, in large sums of money. To provide for the payment of this indebtedness, on October 25th, 1849, he conveyed to complainant and said Dart, as assignees, for the benefit of his creditors, three lots, with the improvements thereon, situate in the city of Augusta. There are still debts outstanding against said Taylor, to secure the payment of which said conveyance was made. Norman Dart having departed this life, the title to said property is in complainant, as surviving assignee. Complainant and his co-assignee, during his life, being both residents of the city of New York, were unable to give their personal attention to the supervision of said property, and constituted said Taylor as their agent for that purpose. He rented said lots, collected the rents and paid the taxes thereon.

Taylor died in November, 1869. The defendant qualified as his administrator eighteen months before the bill was filed, and as such has taken possession of said lots, claiming them as a part of the estate of his intestate. Claimant has repeatedly sought to obtain possession of said lots for the purpose of selling them and paying off the debts aforesaid, but has been hitherto prevented by said defendant.

Prayer, that the defendant may be compelled to answer the charges herein made ; that an account may be taken of the rents received by Taylor during his life and by the defendant since his death ; that some proper person may be appointed to take possession of said property, with authority to sell the same, and that the writ of subpoena may issue.

The defendant acknowledged service of the bill on May 12th, 1871, and consented to the appointment of a receiver as prayed for. On August 10th, 1871, William Davidson was appointed receiver, with authority to sell, etc. The bill was filed in office on August 18th, 1871.

The defendant, by his answer, denied any knowledge of any of the matters set up in complainant's bill; denied that complainant ever made any efforts to obtain possession of said property until the first part of the year 1871. He pleaded generally the statute of limitations, and specially the Act of March 16th, 1869.

The complainant made out, by proof, the case stated in his bill. It also appeared from the evidence that Taylor expected to receive the surplus of the proceeds of said property after payment of said debts. The deed under which he claimed was as follows :

"STATE OF GEORGIA—RICHMOND COUNTY :

"This indenture, made the 25th day of October, in the year of our Lord 1849, between Francis C. Taylor, of the one part, and Norman Dart and Newbold Lawrence, of the State of New York, assignees, of the other part : Witnesseth, that the said Francis C. Taylor, for and in consideration of the sum of \$1,200 00 to him in hand well and truly paid, by the said party of the second part, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, released, conveyed and confirmed, and by these presents doth grant, bargain, sell, release, convey and confirm unto the said Norman Dart and Newbold Lawrence, assignees, their heirs and assigns, all those three lots or parcels of land situate and lying, and being in the upper part of the city of Augusta, county of Richmond, and State of Georgia, bounded on the north by Broad-street, on the South by Ellis street, on the east by a lot of land now or formerly owned by Henry B. Holcombe, west by a lot of land belonging to Edward Thomas, each of said lots or parcels of land containing a front on said Broad street of forty feet, more

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or less. Together with all and singular the rights, members and appurtenances thereof whatsoever to the said lots or parcels of land, being, belonging or in any wise appertaining, and the remainders, reversions, rents, issues and rights thereof, and every part thereof: To have and to hold the said lots or parcels of land, and all and singular the premises, and appurtenances thereunto belonging, as aforesaid, and every part thereof unto the said Norman Dart and Newbold Lawrence, their heirs and assigns forever, and the said Francis C. Taylor and his heirs, the said lots or parcels of land and premises aforesaid, and every part thereof, unto the said Norman Dart and Newbold Lawrence, their heirs and assigns, against himself, the said Francis C. Taylor, and his heirs, and all and every other person and persons whomsoever, shall and will warrant and forever defend by these presents.

“In witness whereof the said Francis C. Taylor hereunto set his hand and seal the day and year first above written.

(Signed) “FRANCIS C. TAYLOR, [L. s.]

“Sealed and delivered in the presence of

(Signed) “ROBERT PHILIP,

“RICHARD ALLEN, J. P.”

There was also evidence to show that other property had been conveyed to the same grantees by Taylor for the same purpose, or in payment of his debts, and that this property had been lost both to the creditors and Taylor. It did not appear by whose fault it had failed to be productive, but that Taylor had claimed before his death that the debts were paid and a balance due him. The debts were in account, and created in 1848.

The jury returned a verdict for the defendant. The complainant moved for a new trial upon the following grounds:

1st. Because the Court erred in charging the jury, “that if the debts, to secure which the conveyance in question was made, were barred, the land reverted to the grantor.”

2d. Because the Court erred in refusing to charge, “that the title of the grantee could not be divested by proof, that

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the balance of the debts, to secure which the conveyance was made, were barred, it appearing at the same time that the debts had never been wholly paid off."

2d. Because the verdict was contrary to the law and the evidence.

The Court granted the new trial, holding that the conveyance was made as payment and was so accepted by the creditors at the time, with privilege of redemption. To this ruling the defendant excepted, and now assigns the same as error.

JOHN S. DAVIDSON ; JOHN T. SHEWMAKE, for plaintiff in error.

BARNES & CUMMING, for defendant.

TRIPPE, Judge.

The complainant, as the surviving grantee in a deed executed in 1849, and absolute on its face, seeks to engraft a parol trust thereon to him and his deceased co-grantee, to-wit: that it was made for the purpose of the property therein mentioned being applied to the payment of debts existing in account and contracted in 1848, and due to the grantees, severally, and divers other parties. There is no reference in the deed to any debts, nor indeed was there any satisfactory evidence what debts were intended to be secured. After the lapse of twenty-two years, and after the death of the alleged debtor, complainant asks to be allowed to set up the parol trust, and to enforce the collection of the debts that would be more than three times barred by the statute of limitation, unless they can be saved by the course he seeks to adopt. Prior to the Act of 1856, a verbal promise to pay a debt would take it out of the statute, or give a new point of time from which the statute would commence running. Since the passage of that Act a new promise to have that effect must be in writing. If there was no such written promise in this case these debts must have been barred, taking the most favorable view for complainant, in 1860. This is supposing that

verbal promises had been made up to the latest date that they could have been effective. Certainly they would have been barred when the suit was instituted by the Act of March 16th, 1869. Now is there any written acknowledgment of these debts at any time, as subsisting debts, from which a promise to pay could even be inferred? The record discloses none. The letter of Taylor, the intestate, does not admit them as subsisting debts, but it sets up, substantially, not only that they are paid but that there is an overplus of the property which discharged them, which rightfully should be his. Had the deed specified the debts, and provided for their payment, it might be that it would have given them the character of obligations or debts under seal. But, as stated, there is no reference to them in the deed, and no proof of any written acknowledgment of them. It would be manifestly against all legal principle to permit the parol trust to be proven by parol evidence, and then to hold that such testimony gave to simple contract debts existing in account, the *status* of specialties.

Under this view there could have been no legal liability on Taylor's estate for these claims in 1871, which could have been enforced, independent of the Act of 1869. But whether that position be correct or not, we do not think that the allegations in the bill and the proof at the hearing entitle the complainant to any greater rights than a mortgagee would have, or than if the debts had been securities under seal. Twenty years will bar the right of action on instruments under seal, and the right of a mortgagee to foreclose. So, if the mortgagee receives possession of the mortgaged property under the mortgage, twenty years will bar the mortgagor's right to redeem, although the former, in such instances, is usually called a trustee for the latter: *Morgan vs. Morgan et al.*, 10 *Georgia*, 300; 3 *Johns. Ch. R.*, 129; 3 *Atk.*, 313. We do not see from the facts in the record why the creditors in this case should have superior rights to a mortgagee to foreclose, or to a mortgagor to redeem. The mortgagee and this complainant both would sustain the relation of a creditor to the party against whom they may severally pro-

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ceed, and the object of each suit would be the same, to collect a debt. Why should not the presumption of the law as to payment, or the repose intended to be secured by the statute, enure to the benefit of the alleged debtor in the one case as well as in the other? We think this can be done, and that it does no violence to the rule, that the statute of limitation does not apply to a direct subsisting trust, a rule that denies the right to a trustee to set up the statute against his *cestui que trust*. Though the debts attempted to be enforced by complainant, had they been secured by instruments under seal, or by mortgage, might not be barred by the lapse of twenty years, in view of the different Acts suspending the statute of limitation, yet, according to the decisions made during the present term, in the cases of *John George vs. James Gardner*, and *Moravian Seminary vs. W. H. Atwood, administrator*, we hold that even had they been of that character, the Act of March 16th, 1869, would bar complainant's right of recovery.

The verdict of the jury having been rendered in favor of defendant, the judgment granting a new trial is reversed.

THOMAS S. POWELL, plaintiff in error, vs. WILLIS F. WEST-MORELAND, defendant in error.

Where the defendant, who was a surgeon and a physician, was prevented from being in attendance upon the Court at the time of the trial of his case, by an urgent call upon him in his professional capacity, which it was his paramount duty to obey, and it was made to appear, by affidavit, that his evidence would have been material, and that his counsel were deprived of his aid in the defense, this Court will not control the discretion of the Court below in ordering a new trial.

New trial. Before Judge HOPKINS. Fulton Superior Court. October Term, 1872.

For the facts of this case, see the decision.

Powell vs. Westmoreland.

D. F. & W. R. HAMMOND; A. C. GARLINGTON, for plaintiff in error.

L. E. BLECKLEY; T. P. WESTMORELAND; JOHN MILLEDGE, for defendant.

WARNER, Chief Justice.

This was an action of trespass for an assault and battery, and a verdict for the plaintiff for \$4,447 18. The error complained of is that the Court below granted a new trial, on the ground that the defendant was prevented from being present at the trial for the reasons stated in the following affidavits:

"W. F. Westmoreland, the defendant in the above stated case, being duly sworn, deposeth and saith that he intended to be present at the trial of said case, and was about to leave his office, a few hundred yards from the Court-house, to attend Court on the morning of the trial, when he received a call, as physician and surgeon, to go immediately to the relief of Mrs. Annie E. Atkinson, who, in eating some sausage-meat, had lodged a piece of wood in her throat. Defendant, supposing that he would be detained but a few minutes, as the lady's house was not far from his office, went to her and found her in great agony. He endeavored to extricate the stick from her throat, but by reason of her nervous condition and frequent efforts to vomit, he did not succeed at once. When he did succeed, she fainted, and this was followed by nervous or hysterical spells, requiring defendant's attention for about two hours. Another physician (Dr. Sterling) was sent for, and as soon as he arrived deponent left and went to the Court-house. When he reached there, the trial was ended, or about ended, as deponent was informed, and being told that he was too late, and not knowing or supposing that he would then be heard, he went away and gave his attention to other urgent professional business. Deponent believes that it was between nine and half-past nine o'clock, A. M., when he went to see the lady, and that he reached the Court-house before twelve o'clock, M. He says he was at the time a regular practicing

physician and surgeon in the city of Atlanta ; that he was Professor of Surgery in the Medical College, and gave special and particular attention to cases of surgery, to which branch of practice the case of Mrs. Annie E. Atkinson appropriately belonged. Deponent believes that this was the reason why the call was made upon him rather than upon some other physician of the city. He states that but for said call, he would have been at the trial, and that his presence there would, he believes, have been serviceable to his defense. He had not intended to be absent at the time, and had not prepared his counsel to conduct the defense without the help of suggestions and explanations from deponent himself. Deponent also knew material facts to which he could and would have testified as a witness. He would have sworn that plaintiff was not confined for as much as two weeks ; or, at all events, that deponent saw him on the streets in less time than that—probably within a week or ten days after the rencounter. He could and would have testified that he chastised plaintiff for instigating a scandalous publication touching a member of deponent's family, involving her honor as a lady. Deponent believed, in good faith, that plaintiff was guilty of this outrage, and acted on that belief ; and he could have explained his conduct to the jury had he been present at the trial."

This affidavit of the defendant as to the condition of Mrs. Atkinson, and his attendance upon her, is corroborated by her affidavit, and the affidavit of Clara Stapler.

The 3661st section of the Code declares that the Superior Courts in this State, shall have power to grant new trials in any cause depending therein, in such manner and under such rules and regulations as they may establish according to law and the usage and custom of Courts. The Code also specifies several grounds on which new trials may be granted, but the ground of the present motion is not included in them. The 3667th section, however, declares that in all applications for a new trial on other grounds not provided for in this Code, the presiding Judge must exercise a sound legal discretion in granting or refusing the same, according to the provisions of

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the common law and practice of the Courts. In this case, the defendant was prevented from being present at the trial by an occurrence which, in our judgment, it was his paramount duty to regard, as a physician and surgeon, and to have given his time and attention to his suffering patient, and that he cannot be said to have been in default in not being present at the trial, under the statement of facts disclosed in the record. The plaintiff stated in his evidence that he was confined to his house six weeks on account of the injury he received. The defendant states that if he had been present at the trial, he would have testified that the plaintiff was not confined as much as two weeks; that he saw him on the streets within a week or ten days after the rencounter. This would have been competent evidence in rebuttal of the plaintiff's evidence, although the other facts which he proposed to prove might not have been competent, besides, it was his right to have been present to have aided his counsel in his defense independent of his right to have been sworn as a witness in his own favor.

In view of the facts as disclosed in this record, we will not control the exercise of the discretion of the Court below in granting the new trial. The presiding Judge was present on the former trial, and is much more familiar with what then transpired than this Court possibly can be.

Let the judgment of the Court below be affirmed.

JAMES M. FIELDS, for use, etc., plaintiff in error, vs. JOSEPH WILLINGHAM *et al.*, defendants in error.

1. F. owning certain mills, sold, in September, 1860, one-half interest therein, with all necessary water privileges, to W. and C. for \$7,444 00, with warranty. The deed was duly recorded. In November, 1861, W. and C. reconveyed the same, with warranty, to F. for \$8,500 00. In January, 1867, F. sold one-half of said mills to T., and in January, 1868, at United States Marshal's sale, under execution against F., T. and E. purchased the other half. When F. sold to W. and C., and

when the reconveyance was executed by them to him, the water, on account of the mill-dam, was backed upon and overflowed the land of W. and C., and also land owned by other persons. The latter, by legal proceedings in 1872, caused the dam to be taken down, thereby impairing the value of the property. For this, as a breach of the warranty of W. and C., an action of covenant was brought:

Held, That as the warranties in the respective deeds of F. and of W. and C. were substantially the same, although the latter deed was for a larger consideration than the former, F. would not be entitled to recover for a breach of the warranty of W. and C. for a cause existing at the time F. made his warranty.

2. Subsequent vendees holding under F., whether purchasing at public or private sale, are affected by the equities existing between F. and W. and C., especially if they had notice of the facts upon which those equities are founded.

Warranty. Covenant. Vendor and purchaser. Before Judge HARVEY. Gordon Superior Court. February Term, 1873.

James M. Fields, for the use of Elias E. Fields, Lewis Tumlin and Samuel Pulliam, brought an action for breach of covenant against Joseph Willingham, and James A. Cantrell and George W. Collier, as administrators of Merideth Collier, deceased, laying his damages at \$12,000 00. The declaration made this case:

On November 4th, 1861, Joseph Willingham and Merideth Collier, then in life, made and delivered to plaintiff their deed of that date, by which it was witnessed that said Joseph and Merideth, in consideration of \$8,500 00 to them paid by plaintiff, sold and conveyed to him, his heirs and assigns, the one-half interest in ten acres of lot of land number sixty-six, of the seventh district and third section of Gordon county, together with one-half interest in the Salaquoy Mills, located on said parcel of land, with the right to water privileges, the same as were then enjoyed, and the said Joseph and Merideth, for themselves, their heirs, executors and administrators, the said bargained premises, unto plaintiff, his heirs and assigns, did forever warrant against themselves and against the claims of all other persons whomsoever.

Plaintiff alleges a breach of said warranty, in this, that

Robert H. Nesbit and William A. Nesbit, by a judgment of the Superior Court of said county, had the mill dam on said ten acres torn down, and the water let off and reduced seven feet in height, because the water, at its height when said deed was made, backed upon and overflowed the lands of the said Nesbits, so that said mill and land have become wholly worthless. Plaintiff shows that said defendants not only had full notice of said legal proceedings, and of a bill for injunction filed against plaintiff and others for obstructing the Conesauga river by the dam of said mill, but aided and actively assisted in having said dam taken down and said mill property ruined.

Amongst other defenses, the defendants pleaded that no consideration was paid to them by said plaintiff for said deed; that, on September 3d, 1860, said plaintiff represented to defendant, Willingham, and Merideth Collier, deceased, that said mill property was very valuable, that he had a valid title to the same, and to all the water privileges necessary to the successful operation of said mill, and thus induced them to make a purchase of the one undivided half interest in said property, giving therefor their notes in the aggregate amount of \$7,544, he making to them a warranty deed to the same; that it was agreed between the parties to said purchase that said Collier and Willingham should have two years to determine whether they would hold said interest or not, during which period they should have the right to reconvey, taking up said notes; that the trade was, in fact, rescinded by said Collier and Willingham taking up their notes and executing the deed set forth in the declaration; that the increased consideration mentioned in the last deed was no part of the inducement for executing the same, but represented other moneys that had become due to Willingham and Collier from the plaintiff between the time of the trade and the rescission thereof; that the height of the water, at the time of the execution of the deed to the plaintiff, was the same as it was at the time said plaintiff conveyed to Collier and Willingham; that the understanding and contract was that they were to convey back said property with the same rights and privileges as were conveyed to them.

The plaintiff made out a *prima facie* case, as stated in his declaration. The defendants showed the conveyance of the undivided half interest in the mill property to them, as stated in their plea, to-wit: on September 3d, 1860. Also, a conveyance from said plaintiff to Lewis Tumlin of an undivided half interest in said property, dated January 12th, 1867. Also, a deed from the United States deputy marshal, conveying an undivided half interest in said property to Elias E. Field and Lewis Tumlin, of date January 7th, 1868. This instrument was made in accordance with a sale of said interest, under an execution issuing from the District Court of the United States for the Northern District of Georgia.

The defendant, Willingham, testified substantially to the facts as stated in the plea. He explained the difference between the considerations expressed in the two deeds as follows:

At the time of the rescission of said sale, plaintiff sent for defendant and Collier to come to the mill, and they accordingly went. He said that he desired either to take back the half interest in the mill or to lease it—he must have sole control of it. After some conversation, defendant and Collier agreed to let him have said interest back. But they had furnished hogs and a cow to the mill of the value of \$100 00 or \$150 00, and the mill had cleared, during the time they owned an interest in it, over \$2,000 00. The agreement was accordingly made that plaintiff should pay to them \$1,000 00, settle the debts of the firm, give up their notes, and they would reconvey to him the same interest they had purchased, and he should have all they had put in and all the mill had made. This \$1,000 00 was all that defendant and Collier ever received on account of said mill, etc., and though embraced in the expressed consideration in the deed from them to plaintiff, yet, in fact, it was paid as above stated. Plaintiff has never settled the debts of the firm; about \$800 00, principal, remains unpaid; he is insolvent.

The plaintiff testified that the \$1,000 00 paid by him was a part of the consideration of the deed made by Collier and Willingham to him; that the profits of the mill had been divi-

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ded before that time; that he threatened to withdraw from the trade unless the warranty was embraced therein.

The only connection that Samuel Pulliam seems to have had with the property is derived from the fact that after the mill house was burned, Tumlin, Fields and he, the useses set forth in the declaration, built another.

Much other testimony was introduced, but being considered immaterial, is omitted.

The Court charged the jury, "that if the plaintiff first sold to the defendants the same property and the same water privileges, with warranty of title, this would not necessarily bar or defeat the plaintiff's action, unless he had thrown defendants off their guard by misrepresentations as to the extent of the water privileges; but that if the plaintiff paid more in repurchasing the property than the amount of his warranty to them, the surplus over the amount for which he was liable to them on his warranty, might be recovered, provided there had been a breach of the water privileges proven in this case, and the damage sustained you find to be more than Fields' warranty to them—that is to say, if the warranties each way were for a half interest in the property, plaintiff cannot recover unless half the damage to the whole property exceeds the amount of consideration and interest expressed in plaintiff's warranty to the defendants, and then only for the difference."

The jury returned a verdict for the plaintiff for \$1,390 00 and costs.

The defendants moved for a new trial upon several grounds, and amongst them, because the verdict was contrary to the law and the evidence, and because of error in the aforesaid charge. The motion was allowed and a new trial ordered. Whereupon plaintiff excepted.

W. H. DABNEY; J. A. W. JOHNSON; D. A. WALKER,
for plaintiff in error.

WARREN AKIN; W. K. MOORE, for defendants.

TRIPPE, Judge.

1. The respective deeds from Fields to Willingham and Collier, and from the latter back to the former, were, so far as they affect the rights growing out of this action, substantially the same, both as to what was conveyed by the deeds, and the warranties contained in them. It may be true, that by the deed of Willingham and Collier, Fields obtained the right to the overflow of their land as the water stood when each of the conveyances was executed. It does not appear that he had that privilege before these sales were effected. No claim is asserted by the plaintiffs founded on any breach of the warranty to Fields, so far as that right is concerned. The fact that this easement was thus secured, in addition to what he formerly owned, cannot strengthen his claim, or those claiming under him, to damages for the loss of the right to overflow the lands of the Nesbits. It may have been one inducement to have caused the increase in the consideration expressed in the deed of Willingham and Collier over that in the deed of Fields. It cannot be doubted that if the consideration of the two deeds were the same, that Fields could not recover of Willingham and Collier for a breach of the warranty, from a cause existing at the time he made his deed to them. For his recovery would be the ground and measure of a recovery by them back from him, and the law will not permit such a circuitry of action. This was not denied in the argument, nor did we understand it to be denied that Fields' privies, or the successors in the title under him, the plaintiffs in this action, would labor under the same disability.

But the position assumed by plaintiff in error is, that the sole ground of this rule is, that the two recoveries must be for precisely the same sum; that if the rights of the respective parties were not governed by the same measure of damages, and the recoveries would not be equal in both actions, then the right of action exists in the first warrantor, although he has warranted the same property to the defendant.

It is true, this doctrine of rebutter, as thus applied, is often

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put upon the ground, that where the plaintiff's judgment or recovery would be the foundation of another suit by the defendant against the plaintiff, such recovery will not be allowed, because the very amount of plaintiff's judgment will be the amount of a second one against him in favor of the defendant. But it is not always stated with the qualification that the recoveries must be identical in cases of mutual warranties. In *Sibley vs. Beard*, 5 Georgia, 552, the rule is stated to be: "If A sells property to B, with warranty of title, and B sells the same to A, with warranty, and A is deprived of it by legal process upon a title in a third person, he cannot maintain an action against B for the breach of his warranty, because if he recovers of B he would be entitled to turn round and sue A for a breach of his prior warranty. The Courts will avoid circuitry of action." And again, in the same case, if A sells to B and B to C, and C back to A, all with warranty, and A be dispossessed upon a title paramount in D, he cannot maintain an action against C, for the parties being all in privity, the liability would come round on A. No reference is made in the decision to the fact, whether, in the case before the Court, the respective recoveries, if allowed, would be identical, and nothing as to what was the consideration of the respective sales. It was held that there was no privity between Beard and Sibley, and hence, that the doctrine as to circuitry of action did not apply between them. Beard had sold the property to the Eagle and Phoenix Hotel. Sibley sold to Beard. It did not appear how Sibley got his title. The decision further says: "If the Eagle and Phoenix Hotel had sold the property to Sibley with warranty, and he back to again to Beard, the principle would be applicable." The facts of the case were, as will be seen by the original record, that the respective considerations of the two contracts were not the same. One was for \$300 00 and the other for \$250 00. No importance was given to that, nor does it seem that it would have affected the judgment.

The same principle is frequently stated without its being put on the ground of the recoveries being for the same amount.

Take the case of a deed made by A to B, with warranty, the consideration of which is love and affection, commonly called a deed of gift. If B were to re-convey to A, with warranty, and A were evicted by C upon a paramount title, could A recover of B upon a breach of his warranty? By our law the measure of recovery is the purchase money and interest. B paid nothing. Could he recover of A if he were evicted? The measure of A's claim would be what he paid B, if he could recover at all. It would not be the principle of circuity of action founded on the several recoveries being equal, that would prevent an action by A. Another element enters into such questions when they arise on reciprocal warranties. The first warrantor, who is the plaintiff in the cases supposed, has solemnly assured his vendee, by deed, that he has the title, and gives his covenant of warranty to maintain the truth thereof. His covenantee accepts it, acts upon it, and may improve the property purchased. He re-conveys to his vendor, it may be, for a greater price than he gave. The title fails, because it never was in the original vendor. Can he be allowed an action, resting it upon the falsity of his solemn assurance? Can he deny the title which he affirmed by seal and warranty was in him, by showing it in somebody else, and thereby make what is the breach of his own covenant the foundation of another right in him against his own vendee?

Lord Mansfield, in *Goodtitle vs. Bailey*, 2 Cowper, 597, defines an estoppel by matter of deed, thus: "No man shall be allowed to dispute his own solemn deed." Bigelow, in his work on Estoppel, 267, says: "An estoppel, by matter of deed, may be defined to be a preclusion against the competent parties to a valid sealed instrument and their privies, to deny its force and effect by any evidence of inferior solemnity." Our own Code, under this head, when speaking of presumptions of law, which will not allow an averment to the contrary, specifies: "Recitals in deeds, except payment of purchase money, as against the grantor acting in his own right and *sui juris*, and his privies in estate, blood and in law." New Code, section 3753.

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To permit a recovery by A against B, on the warranty of the latter to the former, when A had made a prior warranty to B, on the ground of a difference between the considerations of the two deeds, would be in conflict with the above wholesome principle, unless A could recover the whole purchase money he paid, which would be odious, and if he were limited to the *difference between the two prices*, it would be in conflict with the statutory measure of damages, which is the purchase money with interest.

2. We do not understand that it is denied that the subsequent vendees holding under Fields, whether purchasing at a judicial or private sale, are affected by the equities existing between Fields, on the one part, and Willingham and Collier, on the other part; and further, that they had notice of the fact on which these equities are founded, to-wit: Fields' deed to Willingham and Collier. In *Martin vs. Gordon*, 24 Georgia, 533, the facts were, that Gordon sold to Fife, with warranty, the consideration, as recited in the deed, being \$500 00. Fife sold to plaintiff for \$1,000 00. The plaintiff being evicted, brought suit against Gordon on a breach of his warranty. Gordon pleaded that the real consideration of his deed was only \$100 00. It was held that "neither Gordon's grantee nor any subsequent conveyancee, in the absence of fraud, is entitled to recover more than the price actually paid for the land, with the interest thereon." Judge LUMPKIN said, "the result of a careful examination of the authorities establishes that subsequent purchasers are affected by the equities between previous parties. If A sell land to B, with covenant of warranty, and B releases A and sells to C, who is evicted by paramount title, A is nevertheless discharged, and damages cannot be recovered against A by C, upon A's warranty to B." BENNING, Judge, went still further. He said, "Gordon having no title when he made the warranty to Fife, the warranty did not pass from Fife to his assignee, and consequently a right of action on it never vested in her." Many authorities were cited on this point, but it is not necessary to consider that question now. The evidence showed that Fife had given Gordon a

bond of indemnity before he sold. Judge BENNING expressed a strong intimation that the bond was a release of Gordon, and extinguished the covenant, thereby preventing it from passing to Fife's assignee, whether she purchased with or without notice of such release. Both Judges concurred in the decision that the consideration of Gordon's deed to Fife being, in fact, but \$100 00, though expressed to be \$500 00, Fife's assignee could not recover but the \$100 00. And this was not put upon the ground that Fife's vendee had notice of such fact. It was so held, independent of the question of notice to her. Judge McDONALD dissented from the judgment of the Court, and put his dissent on the ground that Fife's vendee purchased without notice. He admitted that Gordon could show the consideration was only \$100 00, for the purpose of limiting Fife's recovery, but not to affect a *bona fide* purchaser without notice. He did not deny that she would be affected by it if she had notice.

In the case under consideration, the subsequent vendees were, by law, charged with notice. The section of the Code which has been quoted includes the grantor and his privies in estate. Fields' deed to Willingham and Collier was part of the chain of title held by these purchasers, and the fact of his warranty was apparent on its face. On that fact was based Willingham and Collier's equity, and of it they had knowledge. Moreover, the deed was of record.

We do not think that what Willingham and Collier did towards aiding the Nesbits in their suit can affect their liability. That was a matter touching the rights of the Nesbits. Fields had warranted, in substance, that they had none. He cannot complain at their assertion to the contrary. It was a right adjudicated by law, and by presumption of law—not only rightly adjudicated, but so done on a state of facts in conflict with Field's warranty. Willingham and Collier were not responsible because those facts existed. Nor did they have any power in controlling the judgment founded on them.

The judgment of the Court granting the new trial is affirmed.

Jaynes & Son vs. Sheffield.

D. JAYNES & SON, plaintiffs in error, vs. R. W. SHEFFIELD,
defendant in error.

Where medicines are delivered to the defendant prior to 1860, to be sold on commission, and a demand was made by the plaintiffs for a settlement in 1871, when the defendant still had some portion of the drugs on hand, and suit was commenced on August 7th, 1872, said action was not barred by the statute of limitations, it being within four years from the time of the demand.

Statute of limitations. Demand. Before Judge CLARK.
Early Superior Court. April Term, 1873.

For the facts of this case, see the decision.

R. H. POWELL, by brief, for plaintiffs in error.

R. W. DAVIS, by brief, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiffs against the defendant on an open account for the sum of \$102 87 for medicines received by the defendants to sell on commission for the plaintiffs. On the trial of the case, as it appears from the evidence in the record, the defendant received from the plaintiffs the medicines embraced in the account prior to 1860, to sell on commission; that he sold most of them during the war, and had a small portion of them on hand at the time of the trial. In September, 1860, defendant wrote a letter to the plaintiffs, in which he stated he had not sold but a small portion of their medicine, and that it was unnecessary to make any settlement at that time, but that he would make a settlement as soon as he thought he had sold medicine enough to amount to anything. Plaintiffs made a demand on defendant for a settlement of the account some time in 1871. This suit on the account was commenced 7th August, 1872. The Court charged the jury, that if the medicines embraced in the plaintiff's account were placed in the hands of the defendant by them prior to the war to be sold on commission, that suit

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must have been brought thereon before the 1st of January, 1870, or it would be barred by the statute of limitations, and they must find for the defendant. To this charge of the Court the plaintiffs excepted. In view of the facts of this case the charge of the Court was error. The medicines were delivered by the plaintiffs to the defendant in trust to sell the same for them, upon a contract that the trust should be faithfully executed and performed on his part; that trust was still subsisting when the demand was made by the plaintiffs on the defendant for a settlement in 1871, which he promised to make in his letter of September, 1860, as soon as he had sold enough of the medicines intrusted to him for that purpose to amount to anything. Besides, the trust was not fully executed and performed at the time of the trial, for the defendant then testified that he had a portion of the medicines on hand. The action was not barred by the statute of limitations when the action was commenced in August, 1872, it being within four years from the time a demand for a settlement was made by the plaintiffs on the defendant for the medicines entrusted to him for sale, and he had done no act up to that time repudiating the trust, or the right of the plaintiffs to have an account from him and settlement for the medicines entrusted to him.

Let the judgment of the Court below be reversed.

MACON AND AUGUSTA RAILROAD COMPANY, plaintiff in error, *vs.* **MOSES MAYES**, defendant in error.

Where a railroad company permits other companies or persons to exercise the franchise of running cars drawn by steam over its road, the company owning the road, and to which the law has entrusted the franchise, is liable for any injury done, as though the company owning the road were itself running the cars.

Corporations. Franchise. Railroads. Before Judge **BARTLETT**. Baldwin Superior Court. February Term, 1873.

Moses Mayes brought case against the Macon and Augusta Railroad Company for \$20,000 00, damages alleged to have

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been sustained by the plaintiff on account of the negligent conduct of the defendant in the running of its cars, by which he lost one of his legs. The defendant pleaded not guilty. The evidence made the following case:

George H. Hazlehurst was the president of the defendant, its chief engineer, and also a member of the firm of George G. Hull & Company, the contractors who were constructing the defendant's road. Whether the road had been entirely completed and formally turned over by the contractors to the defendant, the evidence was conflicting. William Printup was the superintendent of construction under George G. Hull & Company. The plaintiff was about twenty-four years of age. He was a hand employed in laying the track on the Macon and Augusta Railroad. J. W. DeBogan was the engineer of an engine employed by Hull & Company. On the day of the accident, the fireman on DeBogan's engine was sick, and the plaintiff was ordered by Printup to serve in that capacity. Mr. Hazlehurst was on the engine. As they went from Haddock's station towards Milledgeville, they heard a whistle which they thought was at the crossing. After "flagging" the first curve, DeBogan asked plaintiff if he heard anything down the road. He answered that he did not, and they went on. When they reached the crossing, DeBogan blew his whistle. Plaintiff thought he intended to let him off to "flag" the second curve; thought he heard the engine, and asked DeBogan if he was going to "flag." DeBogan replied that he did not think it worth while. A hand on the engine suggested that the whistle which had been heard came from a train on the Eatonton road. Just as he asked DeBogan about "flagging," he turned and saw the engine coming. The collision took place and plaintiff was injured to such an extent as necessitated the amputation of his leg. He received \$1 25 per day for his labor. The defendant pays \$1 85 per day for firemen.

The accident happened on December 1st, 1870, about one and a quarter miles from Milledgeville, in the direction of Macon. The night previous to the accident a dispatch was

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sent to Frank Burnett, conductor on the Macon and Augusta Railroad, saying that a train would come up from Augusta going to Macon. Mr. Hazlehurst stated to DeBogan that he had received a dispatch from S. K. Johnson, superintendent of the Georgia Railroad, to the effect that the special train would leave Camak at 10:45 A. M. The collision took place at about 1:13 P. M. The distance from Camak to the place of collision is between forty-eight and forty-nine miles. DeBogan told Mr. Hazlehurst that they had better not proceed from Haddock. Hazlehurst directed him to go on and to "flag" the curves. He did not "flag" the last curve. He obeyed the instructions of Mr. Hazlehurst because he respected his authority as president of the road. He was put in charge of the construction engine at the request of Mr. Hazlehurst, and consequently felt grateful to him for the appointment; also obeyed him for this reason. He was discharged by Printup. He saw a dispatch from Johnson to Nesbit, agent of defendant at Milledgeville, on the evening before the collision. It was as follows: "A special train will leave Camak for Macon, at 11 o'clock. Suffer no train to pass Milledgeville." "Flagging" is a precaution used for the purpose of preventing collision between trains. A person is sent ahead of the engine, and when he discovers an approaching train he waves his flag, which causes the engine from which he has come to back; thus collisions are avoided.

The evidence was conflicting as to whether, if the second curve approached by the engine upon which plaintiff was, had been "flagged," a collision would have been prevented.

The train coming from Camak was an excursion train that ran at the instance of Hull & Company, the contractors. John P. King, president of the Georgia Railroad, S. K. Johnson, superintendent, Mr. Tyler, vice-president of defendant, and some other gentlemen, were on board. They were passing over the road by invitation—whether of Hull & Company or of Mr. Tyler, the testimony was conflicting.

The question upon which the case turned in the Supreme

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Court, renders unnecessary any more comprehensive statement of the testimony.

The jury returned a verdict for the plaintiff for \$3,500 00. The defendant moved for a new trial upon the following, among other grounds: Because the Court erred in charging the jury, "that if the defendant owned the road, and permitted the Georgia Railroad Company or Hull & Company to run cars thereon, then defendants are liable for all injuries resulting from the negligence or misconduct of the employees of said company so using their said road."

The motion was overruled and the defendant excepted.

GEORGE F. PIERCE; CRAWFORD & WILLIAMSON, for plaintiff in error.

W. A. LOFTON; DUDLEY M. DuBOSE, for defendant.

McCAY, Judge.

It is quite clear that the plaintiff, without fault of his own, has been badly hurt by a collision of trains on the defendant's railroad, caused by somebody's fault. It is scarcely less clear that the person most to blame for the collision was Mr. Hazlehurst himself, and that he is the president of the road. We think the verdict in this case is sustainable on several grounds. There is sufficient evidence of negligence in the speed with which the principal train was running to authorize the verdict. Over a new road, with no regular schedule, common sense indicates a speed far less than the proof shows for this train.

We think, too, the evidence that the tender and engine were making the trip under the direction of Mr. Hazlehurst, the president, justifies the jury in treating the company as the actual perpetrator of the negligence, notwithstanding it may be true that the construction company had not turned over either the engine or the road-bed to the company. But admitting all that is claimed—admitting that this engine and tender were under the control of Hull & Company—that Mr. Hazlehurst is to be looked upon in this transaction as one of the firm of Hull & Company, and not as president of the

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road, what, then, is the state of the case? An engine and tender, under the orders of Hull & Company, were running over the defendant's road. Hull & Company were exercising the franchise granted by the Legislature to the Macon and Augusta Railroad—were running a steam car and tender, and carrying passengers over the road of defendant through the country. We are of the opinion that if this be so, third persons have a right to hold the railroad company responsible for any negligence of Hull & Company or their agents.

The running of cars drawn by steam through the country is a franchise, and unless granted by the Legislature, cannot legally be exercised. And if the railroad company to which the Legislature has granted this franchise permit others to use it, the company is responsible to the public for negligence of such persons. It is but a fair presumption that the Legislature, in granting such a franchise, looked to the capital of the company as a security that the franchise would not be abused. Upon any other view, the company might lease out its privileges to third persons, non-resident or not having property, so that the country would have no security against injuries done by the careless or even reckless use of the franchise.

In our judgment, if a railroad company sees fit to permit another person or corporation to run steam cars over its road, it is liable to third persons for damages caused by the negligence of such persons or corporations, just as though the company had itself been running the cars.

This is a new question here, and is to be decided rather upon principle than authority. It cannot, as it seems to us, be presumed that it was within the intent of the Legislature to grant to this corporation this extraordinary privilege of flying through the country, across the public roads, puffing and screaming and rattling so as to disturb the public quiet, and force everybody to get out of their way, with the additional privilege of turning the right over to any other person at its pleasure.

We are clear that the capital to be invested and the corporation created, are to be held responsible for the misuse of the

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franchise, no matter by whom it is done. The corporation cannot thus escape the obligations implied in its acceptance of the charter. The charter is a contract between the company and the public, and as it is the right of the company to demand that the Courts shall protect it against the infringement of its rights by the public, so it is the duty of the Courts to protect the public against the misuse of its franchise by the company.

Mr. Pierce, in his *American Railroad Law*, gives, as the result of the authorities, the rule we have now laid down in reference to the exercise of the right of eminent domain by the contractors for a corporation: See *American Railroad Law*, 239, and the cases cited.

In the case of *Beman vs. Rufford*, 1 Simon (N. S.) 550, and the case of *Winch vs. B. and L. R. Co.*, 13 L. and E., 506, it was held that it was not within the power of a railroad company to lease out to a third party its corporate franchise of running cars, and in the case of the *York and Maryland L. Railroad vs. Winans*, 17 Howard 39, the Supreme Court of the United States decided that a corporation cannot so turn over its franchise to another corporation as to escape an action of *tort* for a misuse of the franchise. In that case, Judge CAMPBELL says: "Important franchises were conferred upon the corporation to enable it to provide the facilities for communication and intercourse required for the public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided as a remuneration for their grant. The corporation cannot absolve itself from the performance of its obligations without the consent of the Legislature." In that case, the action was by the owner of a patent against the company for infringement of the patentee's rights in the use of certain cars. The company owning the road and having the franchise was not running cars, but another company. That case is not nearly so strong as this. Here Hull & Company were using the franchise of running steam cars through the country, across the public roads and by the side of them—an act which is a nuisance unless by Legislative grant, and in the doing of this

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the damages came to the plaintiff. If the engine and tender were, at the time, under the orders of the president of the road, the case is clear. If under the orders of Hull & Company it was by the consent or permission of the company, and the case stands upon the rule we have discussed. We put the case, in this view, upon the ground that the use of the engine and tender for the purpose set forth in the record, to-wit: to pass over the road with steam cars, from point to point, for the purpose of carrying Mr. Hazlehurst, was a use of the franchise of operating the railroad by steam, and that the corporation is liable, no matter who did it. The case might be different if the contractors were in the prosecution of their proper work, as moving dirt, etc., under circumstances, when they were not exercising the franchise of the company in operating the railroad by steam cars, so as to do that which, without the franchise, would be a nuisance.

For these reasons we affirm the judgment.

SOLOMON MORRIS, plaintiff in error, vs. WILLIAM T. DAVIDSON, assignee, defendant in error.

1. Where, after the levy of a mortgage *fi. fa.*, the property subject thereto was, by consent of the mortgagor and mortgagee, sold by auctioneers, and the proceeds paid into Court for distribution, the assignee of the mortgagor, proceedings in bankruptcy having been, previous to said sale, commenced against him, was entitled to the fund.
2. If the money in controversy had been raised by a judicial sale of the property of the bankrupt by the sheriff, on final process, in the enforcement of a lien of a prior date to the commencement of the proceedings in bankruptcy, there would have been no impropriety in the appropriation of the same to the satisfaction of the mortgage lien.
3. After it is shown to the Court that the defendant had been declared a bankrupt, judicial notice will be taken of the fact that all his property and effects were vested by operation of law in his assignee.

Bankrupt. Mortgage. Judicial sale. Evidence. Before Judge GOULD. City Court of Augusta. May Term, 1873.

For the facts of this case, see the decision.

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BARNES & CUMMING, for plaintiff in error.

1st. The mortgage was valid, and covered all the property sold.

2d. The mortgage lien being valid, the proceeds of the sale, either under our own statutes or in bankruptcy, are to be first applied to the mortgage debt.

3d. The Court below had jurisdiction of the parties and the subject matter, and was competent to apply the money as the Bankrupt Court would have done, viz.: to the satisfaction of the valid lien: Gilbert, assignee, vs. Priest, Sup. Ct. of New York; Shearman vs. Bingham, Sup. Ct. U. S. 7 National Bankruptcy Register, 490; 44 Georgia, 133.

FRANK H. MILLER, for defendant.

1st. Any person interested had the right to claim the money or tender an issue: 7 Georgia, 52, 56; 17 *Ibid.*, 521; 24 *Ibid.*, 146.

2d. An auctioneer of the city of Augusta is bound to pay over the proceeds of sale to the lawful owner: Act December 24, 1827, section 1; and the lawful owner at the time of the sale, February 26, 1872, was the assignee: 40 Georgia, 258; 44 *Ibid.*, 460.

3d. The sale, by consent of Simon and the plaintiff, waived the levy and made it a private sale: 13 Georgia, 485; 43 *Ibid.*, 400.

4th. By acting on the consent of Simon, and having the sale on ten days' notice, Morris accepted a preference, which is void under the bankrupt law: 13 Wal., 40; Clark, assignee, vs. Iceland, C. C. U. S. D. N. Y.; 14 *Ibid.*, 87, Bump's Bank, 6 Ed., 540, 543-4-5-6, 552-3-4.

5th. The lien of Morris attached only to goods on hand at the date of the mortgage, and it was incumbent on him to show that those sold were on hand as against the rights of the assignee: 45 Georgia, 213.

6th. If the lien of the mortgage is good on the proceeds of sale, Morris must prove his debt in bankruptcy, because the goods have been turned into cash by consent of the bankrupt,

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after adjudication, and without the mortgagee's enforcing his legal remedies : 40 Georgia, 258.

WARNER, Chief Justice.

On the 17th of July, 1871, Simon mortgaged his stock in trade to Morris. The mortgage was recorded on the 13th of August, 1871, and foreclosed on the 5th of February, 1872, and on the same day the sheriff levied the mortgage *fi. fa.* on the mortgaged property. On the 7th of February, 1872, proceedings in bankruptcy were commenced against Simon. On the 11th of February, Morris and Simon entered into an agreement that the property should be sold, and the same was sold, by the assent of the sheriff, through Bignon & Crump, auctioneers, as his agents. Other creditors of Simon sued out summons of garnishment against the auctioneers, Bignon & Crump, who answered that they had in their hands \$547 88, as proceeds of said sale, which sum was paid into Court, by consent of all parties, subject to be disposed of upon a motion to pay the same over to Davidson, who had been appointed assignee of Simon subsequent to the sale. On hearing the motion to dispose of the money, the Court ordered it, over the objection of the mortgage creditor, to be paid to Davidson, the assignee. Whereupon Morris, the mortgage creditor of Simon, excepted.

1. The stock in trade covered by the mortgage was not sold by the sheriff at a *judicial* sale, as prescribed by law, but was sold by consent of the mortgagor and mortgagee, as before stated, and the question is whether the mortgagee is entitled to the proceeds of the sale of the stock in trade, under the facts of the case, or whether the assignee in bankruptcy is entitled thereto. The answer to this question must be controlled by the Bankrupt Act of Congress. By the 14th section of that Act, the title to all the property of the bankrupt was, by operation of law, vested in the assignee from the time of the commencement of proceedings in bankruptcy, and although the property of the bankrupt debtor may have been attached

on *mesne* process within four months prior thereto, such process of attachment was dissolved.

2. If the money in controversy had been raised by a judicial sale of the property of the bankrupt by the sheriff on final process, in the enforcement of a lien of prior date to the commencement of the proceedings in bankruptcy, and thus have brought the money into the State Court, there would have been no impropriety in the appropriation of the money by the Court to the satisfaction of the mortgage lien, but the money was not brought into Court by *final process*. The bankrupt's property was sold at private sale, by an agreement between the mortgagor and mortgagee, the auctioneers being employed for that purpose, who were garnished, and the money brought into Court in that way, which garnishments were dissolved by operation of law.

3. The money was in Court, but not brought there by any final process issuing therefrom, and it had been raised by a private sale of the bankrupt's property after he was declared a bankrupt. What was the Court to do with it? The Court was bound to take judicial notice, after it was shown that Simon had been declared a bankrupt, that all his property and effects was vested, by operation of law, in the assignee, who was before the Court claiming the money as a part of the assets of the bankrupt. But Morris, the mortgagee of Simon, insists that he had a specific lien on the property, from the sale of which the money was made, and, therefore, he has a specific lien on the money. The reply is, if that be so, inasmuch as the money was not brought into the State Court by any final process to enforce any mortgage lien in favor of Morris, and the assignee being entitled to all the assets of the bankrupt, under the provisions of the bankrupt law of Congress, the money should be paid over to him, and the mortgagee must go into the Bankrupt Court and assert his lien there. In view of the facts disclosed in the record, there was no error in ordering the money to be paid to the assignee in bankruptcy.

Let the judgment of the Court below be affirmed.

J. B. JOHNSON, plaintiff in error, vs. AMOS HOLMES, defendant in error.

A judgment for the purchase money of land, where the land has been sold for its satisfaction but does not fully discharge the debt, is not such an incumbrance or lien on the crop made on the premises which was matured and gathered before the levy on the land, as will defeat the right of the family of the vendee to the crop as an exemption, etc., under the homestead law.

Homestead. Incumbrance. Crops. Before Judge HILL.
Twigg's Superior Court. April Term, 1873.

Johnson had an execution against Holmes levied upon his crop after it had matured and been gathered. Holmes filed an affidavit of illegality, setting up that the property levied on had been set apart to him as an exemption of personalty under the Homestead Act of 1868.

Upon the trial of the issue thus formed, the following facts were admitted to be true :

The execution was for the purchase money of a tract of land sold by plaintiff to defendant in the first part of the year 1870. After obtaining judgment, the defendant holding said land merely under a bond, the plaintiff filed a deed in the clerk's office as prescribed by the statute, levied on the land, and sold the entire title. The proceeds was not sufficient to satisfy the execution. The levy upon the crop was made on November 27th, 1872, to satisfy the balance. The crop was on the land at the time of the levy, but had been previously gathered. The defendant applied for an exemption of personalty in said crop on November 25th, 1872, and his application was approved by the Ordinary on the 9th of the ensuing December.

The Court charged the jury that if said personal property had been set apart and approved by the Ordinary, as an exemption of personalty to the defendant, then it was not subject to the satisfaction of said *fi. fa.*; that the Act making the land set apart for a homestead liable for the purchase money, did not extend to the crops made on and gathered off the land, and then exempted by the Ordinary.

Johnson vs. Holmes.

The jury returned a verdict in accordance with said charge.

The plaintiff excepted to the charge and assigns the same as error.

JOHN T. GLOVER, by POE & HALL, for plaintiff in error.

No appearance for defendant.

TRIPPE, Judge.

The lien of a judgment for the purchase money of land, where bond for titles only is given, is, by statute, superior to all other liens. But it does not go beyond the land, so far as to its having any other priority over other judgments. If the execution issued thereon were levied on crops produced on the land by the defendant, and which had matured and been gathered, older executions would take in preference. Even if the defendant had produced many crops, and with them had purchased other property, the lien of the older judgments on that property would be superior to the vendor's judgment. Outside of the specific lien given to it by statute, we know of no other priority it has, either in law or equity. The case of *Tift vs. Newsom*, 44 Georgia, 600, does not conflict with this holding. That was a factor's lien, and by statute it had a special lien on the crop produced. The advances were made by the factor for the special purpose of making that particular crop. The *thing* made and levied on was the *very property* that the contract of the parties provided for making. Its production was the object of the contract, and for which the advances were made and the debt created. The lien by the contract, was on that particular thing so to be produced, and on nothing else. It may well have been said that it was "in the nature of purchase money." There the debt and lien were for the *very property* produced by the advances made. Here the debt was exclusively for the land. It has sold that land, having a superior lien over all others on the proceeds, but had no other priority.

Judgment affirmed.

MACKIE, BEATTIE & COMPANY, plaintiffs in error, vs. WILLIAM GLENDENNING, administrator, et al., defendants in error.

1. Conceding the right of the plaintiffs to institute suit on the administrator's bond for an *unliquidated demand against the intestate*, which is left an open question in this class of cases, it is incumbent on the plaintiffs, when the plea of *plene administravit* is filed, to show sufficient assets in the hands of the administrator to meet the indebtedness, and the evidence being conflicting on this point, this Court will not interfere.
2. It is immaterial who makes the application for the twelve months' support for the family of the deceased, so that the representative of his estate has notice; therefore, such an application by the temporary administrator and the action of the Ordinary thereon, is not void as against creditors.

Administrators. Year's support. Before Judge GIBSON. Richmond Superior Court. April Term, 1873.

For the facts of this case, see the decision.

FRANK H. MILLER, for plaintiffs in error.

1st. The motion to dismiss the suit was properly overruled. Action lies on the bond by any one: 43 Ga., 275; Code, sec. 2468.

2d. The administrator, if he received corn belonging to another and sold it, was liable personally: 15 Ga., 189. But if the proceeds went into the estate, the *tort* can be waived and the proceeds claimed: 38 Ga., 216; 28 *Ibid.*, 276; 43 *Ibid.*, 598; 46 *Ibid.*, 296. *Tort* can be waived even after suit brought: Code, sec. 2904; 35 Ga., 18; 39 *Ibid.*, 105; 38 *Ibid.*, 216; 7 *Ibid.*, 191; Code, sec. 3008; 46 *Ibid.*, 120.

3d. Waiting for payment until the corn was carried from the depot to Reed's store was no extension of credit; the title was the plaintiffs' until the corn was paid for: Code, secs. 1589, 2602.

4th. A temporary administrator has no power to make application for year's support: Code, secs. 2451, 2530; 39 Ga., 565; 5 *Ibid.*, 274; 34 *Ibid.*, 393; Sims, sheriff, vs. Thornton,

Mackie, Beattie & Company vs. Glendenning et al.

decided January 28, 1873; 36 Ga., 421; 24 *Ibid.*, 131. And if the application is illegal, it cannot be made binding by remaining of file six months: Code, sec. 2532; 45 Ga., 460; *Brown vs. Crane*, decided January 28, 1873.

5th. The plea of *plene administravit* must be supported by the introduction, as evidence, of the transcript required; annexing transcript to plea is not sufficient.

HENRY W. HILLIARD; MARCELLUS P. FOSTER, for defendants.

Creditor cannot maintain an action against an administrator and the sureties upon his bond on an unliquidated demand against a decedent: Code, (1867) sec. 3307; 7 Ga., 551; 7 *Ibid.*, 31; 6 *Ibid.*, 307, *et seq.*; 3 Redfield on Wills, 93, (6) *et seq.*, and notes; *Ibid.*, 266, 267, and notes; *Ibid.*, 269, (12.)

WARNER, Chief Justice.

This was an action brought by the plaintiffs against the defendant, Glendenning, administrator of Reed, and his securities, on his administration bond, alleging a *devastavit* by the administrator of the assets of his intestate, which came into his hands to be administered. The defendants pleaded *plene administravit* to the plaintiffs' action. On the trial, the jury found a verdict for the sum of \$75 00 in favor of the plaintiffs, who made a motion for a new trial, which was overruled, and the plaintiffs excepted. The defendants also excepted, on the ground that the plaintiffs could not maintain their action against the defendant and his securities on his bond, on an unliquidated demand against Reed, the intestate.

1. The demand of the plaintiffs was founded on an alleged sale of two hundred sacks of corn made by them to the defendant's intestate for cash, which was delivered but not paid for. The plaintiffs sought to recover the corn, under the provisions of the 1589th section of the Code, on the ground that the title to the corn had never passed out of the plaintiffs, but this they could not do, in this form of action, in a suit on the administrator's bond. The plaintiffs were only entitled to recover in

this suit by treating the sale of the corn to the defendant's intestate as a debt due them for the corn delivered to the intestate. It was incumbent on the plaintiffs to have established their debt against the intestate, and that sufficient assets of the intestate had come to the hands of the defendant, as his administrator, to pay it, and that the defendant had wasted the same, conceding their right to sue on the bond for a *devastavit* before they had obtained judgment against the administrator, which we leave an open question in *this class of cases*. There was no demurrer to the defendants' plea of *plene administravit*; if there had been, and it was insufficient, the defendant could have amended it. The evidence as to the amount of the assets which came into the defendant's hands, as administrator, was *conflicting*.

2. It appears in the record that the defendant, who was the father of the intestate's widow, whilst he was temporary administrator, made application to the Ordinary for twelve months' support for the widow and children of the intestate, which was allowed by the Ordinary. It was objected at the trial, that the defendant, as such temporary administrator, had no authority to apply to the Ordinary for the year's support for the family, and that the action of the Ordinary thereon was void as to creditors. The force of this objection, in view of the facts of this case and the provisions of the Code, is not very apparent. By the 2530th section of the Code, it is provided that on the death of any person, testate or intestate, leaving a widow and minor children, it shall be the duty of the Ordinary, on the application of the widow or the guardian of the children, or any *other person* in their behalf, on notice to the representative of the estate, if there be one, and if none, without notice, to appoint five discreet appraisers, etc. If the defendant made the application to the Ordinary, in behalf of his daughter and her children, for twelve months' support, when acting as temporary administrator, he had *notice* of the application, and he was the only representative that the estate had at that time. It does not appear to be a material question, in view of the statute, who makes the application for the twelve months'

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support, so that the representative of the estate has notice of it, if there be one. When the appraisement shall be made, and a schedule thereof returned to the Ordinary, objections may be made thereto, by any person interested, at any time within *six months* after the filing the same in office: Code, sec. 2532. The plaintiffs in this case, filed no objections to the allowance of the twelve months' support by the Ordinary, within the time prescribed. The main question in the case was as to the amount of assets which came into the defendant's hands to be administered, and what amount thereof remained in his hands after payment of the twelve months' support, subject to the payment of the plaintiffs' debt. The jury having passed on that question, under the evidence before them, we will not disturb their verdict. Inasmuch as the counsel for the defendants are content to abide the verdict, we will not consider their exceptions to the ruling of the Court in the progress of the trial.

Let the judgment of the Court below be affirmed.

ALLEN S. CUTTS, plaintiff in error, vs. WILLIAM JOHNSON,
defendant in error.

1. Johnson sued Cutts on a contract dated January 1st, 1868, to deliver to plaintiff one hundred and sixty-two and a half bales of cotton in the fall of 1868, of the crop grown that year. On the trial, defendant proposed to prove by parol that Johnson sold land to one Charlton in 1866 for one hundred and eighty bales of cotton, which were to be delivered in the fall of 1867, and gave bond for titles; that in December, 1866, Charlton transferred the bond to defendant, who afterwards executed to plaintiff the contract sued on, and that the last contract was only a renewal or extension of Charlton's contract, and that defendant was only to pay plaintiff what was due on Charlton's contract for the portion of cotton not delivered by Charlton, estimating it at its value at the maturity of Charlton's contract:

Held, That the testimony was inadmissible.

2. Though the documentary evidence, the exclusion of which was excepted to, may be not embraced in the bill of exceptions, no motion

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for a new trial having been made, the writ of error will not be dismissed, but the plaintiff will be heard on exceptions to the parol evidence. See end of Report. (R.)

Evidence. Practice in the Supreme Court. Before Judge CLARK. Sumter Superior Court. October Term, 1872.

Johnson brought suit against Cutts on the following contract:

"AMERICUS, GA., SUMTER COUNTY, Jan. 1st, 1868.

"At any time between the 25th of September and 25th day of December, 1868, I promise to pay to William Johnson, of North Carolina, one hundred and sixty-two and one-half bales of good, sound, merchantable cotton, of average quality, raised on his plantation, to be delivered at Americus depot, closed in new bagging and ties, weighing on average five hundred pounds each, to be received at any time within the specified time, whenever fifty bales are presented, the cotton to be of the present year's crop, for value received. Witness my hand and seal. (Signed) A. S. CUTTS."

"Received on this forty-four bales cotton, weighing twenty thousand four hundred and three pounds, (20,403 pounds,) December 30th, 1868."

"Received on this four bales cotton, weighing forty-six hundred and ninety pounds, (4690 pounds,) May 12th, 1869."

The defense sought to be established is difficult to be understood, on account of continual reference to papers said to be attached to the bill of exceptions, as exhibits, but which, by an omission, were not so annexed. But it appears that the defendant sought to show by parol evidence that plaintiff, on November 7th, 1866, sold certain lands in Sumter county to one C. W. Charlton, for one hundred and eighty bales of cotton, weighing five hundred pounds to the bale, to be delivered in Americus at any time from the middle of September until the 25th of December next, the plaintiff giving his bond to execute a conveyance, upon a compliance by Charlton with the terms of said contract; that on December 27th,

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1866, Charlton transferred said bond to the defendant, who executed the obligation sued on in renewal or extension of Charlton's undertaking, and that consequently the defendant was only liable to the plaintiff for what was due on Charlton's contract for the portion of cotton not delivered by him, estimating it at its value at the maturity of his (Charlton's) contract.

The evidence was excluded, and the defendant excepted.

The jury returned a verdict for the plaintiff for \$9,546 69, with interest from December 25th, 1868. The defendant
● assigns error upon the aforesaid exception.

When this case was called in the Supreme Court, a motion was made to dismiss the writ of error, because certain documentary evidence, to the exclusion of which exception had been taken, and which was referred to in the bill of exceptions, as exhibits, were not so annexed. There was no motion for a new trial, and the evidence consequently came up as a part of the bill of exceptions. The Court overruled the motion, but confined counsel in their argument, to the exceptions to the exclusion of certain parol evidence, refusing to take under consideration any question which involved said documentary evidence.

W. A. HAWKINS ; C. T. GOODE, for plaintiff in error.

HAWKINS, GUERRY & HOLLIS, for defendant.

TRIPPE, Judge.

The question is not what are the rights or equities of the holder of Johnson's bond for titles—that is, whether or not he can demand titles from Johnson upon the payment of the value of one hundred and eighty bales of cotton under Charlton's contract and the stipulations in the bond. But it is what is Cutt's liability upon the contract sued on. The contract made by Cutts was to deliver to Johnson one hundred and sixty-two bales of cotton in the fall of 1868. Cotton was worth more in the fall of 1868 than in the fall of 1867. De-

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fendant proposed to prove that it was the understanding of the parties that he was not to deliver one hundred and sixty-two bales specified in his contract, but that he was only to pay the unpaid portion of Charlton's contract, estimating the cotton at its value, not in 1868, but at the maturity of the Charlton contract. It was not claimed that there was any fraud or mistake in Cutts' written agreement, but simply that at the time it was executed the contract was different from the written terms. In other words, it was proposed to prove that Cutts was not to pay one hundred and sixty-two bales of cotton in the fall of 1868, but more or less according to what it might take, rated at its value in the fall of 1868, to pay what that much cotton was worth at the price of cotton in the fall of 1867. If one hundred and twenty-five bales at twenty cents in 1868 would be as much as one hundred and sixty-two bales at fifteen cents in 1867, then that was to be the amount delivered, and that amount is all that could be recovered. This would be substituting a verbal contract for a written one, both made at the same time, and differing probably several thousand dollars in their results. The plaintiff below could not claim such an alteration or substitution, had the prices of cotton been reversed at those two seasons, and the rule of law is too plain to allow the defendant (plaintiff in error) to do so.

Judgment affirmed.

GEORGIA RAILROAD AND BANKING COMPANY, plaintiff in error, *vs.* ALEXANDER MONROE, defendant in error.

1. All railroad companies are liable to be sued in any county in which the cause of action originated, by any one whose person or property has been injured by such railroad company, for the purpose of recovering damages for such injury, without any special notice and claim for damages therefor, as a condition precedent to his right to recover for such injury.
2. Where damage has ensued by the running of cars, the presumption of negligence is against the railroad company.

Georgia Railroad and Banking Company *vs.* Monroe.

Railroads. Demand. Negligence. Before Judge ROBINSON. Morgan Superior Court. November Term, 1873.

For the facts of this case, see the decision.

BILLUPS & BROBSTON, for plaintiff in error.

REESE & REESE, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendant to recover damages for killing a mule, by the running of its locomotive and cars on its road. On the trial of the case, the jury found a verdict for the plaintiff for the proven value of the mule. A motion was made for a new trial, on the several grounds set forth therein, which was overruled by the Court, and the defendant excepted.

1. By the 3406th section of the New Code, all railroad companies are liable to be sued in any county in which the cause of action originated, by any one whose person or property has been injured by such railroad company, their officers, agents, or employees, for the purpose of recovering damages for such injury, without any special notice and claim for damages therefor, as a condition precedent to their right to recover for such injury. To hold otherwise, would be inconsistent with the plain words of this section of the Code, which has been adopted as the law of the State. In this case, the agents of the defendant had notice of the injury done to the plaintiff's property, and the defendant might have tendered him the amount of damages done to it before suit brought, as provided by the 3056th section of the New Code.

2. The plaintiff's mule was in a field around which there was a good fence eight or ten rails high, but had jumped the fence, and got on the railroad track, where it was killed by the running of the defendant's locomotive and cars. By the 3033d section of the New Code, the defendant was liable for killing the plaintiff's mule, unless it had been shown at the

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trial that the defendant's agents had exercised all ordinary and reasonable care and diligence—the presumption that they had not done so, was against the defendant. In relation to this material point in the case, the defendant offered no evidence. In view of the evidence disclosed in the record, there was no error in overruling the motion for a new trial. X

Let the judgment of the Court below be affirmed.

JOSEPH MIZE, plaintiff in error, vs. THE STATE OF GEORGIA,
defendant in error.

The plea of *autrefois convict* to an indictment for a misdemeanor in the Superior Court may be sustained by proof of such former conviction before an Inferior Court having jurisdiction of the offense, unless it appear that such indictment was found prior to the prosecution in the Inferior Court, and that the defendant had been arrested under it.

Criminal law. *Autrefois convict* Jurisdiction. Before Judge CLARK. Sumter Superior Court. April Adjourned Term, 1873.

Mize was indicted for gaming, alleged to have been committed on April 12th, 1873. He pleaded former conviction, "that he was, on the affidavit and written accusation of one William Mims, arraigned and tried in the Justice Court for the seven hundred and eighty-ninth district, before their Honors John B. Pilsbury, Notary Public, and W. C. Godwin, Justice of the Peace, for the same offense, and was, on his plea of guilty, sentenced and punished for the same offense, as is set forth in said indictment, said Justice and Notary Public having authority and jurisdiction to try said offense."

Upon the trial of the issue thus formed, the defendant tendered in evidence the affidavit, accusation, plea and sentence set forth in the plea aforesaid. Upon objection to said testimony, on the ground that an indictment was pending in the Superior Court at the time of said proceedings before said Justice and Notary Public, it was excluded.

See 58 Ga. 105
Complice in crime -

Mize vs. The State of Georgia.

The jury found the issue in favor of the State.

The defendant was then placed on trial, upon the plea of not guilty. The jury found to the contrary. A motion for a new trial was made upon the ground of error in the aforesaid exclusion of testimony. The motion was overruled, and the defendant excepted.

C. T. GOODE, for plaintiff in error.

C. F. CRISP, Solicitor General, by PHIL. COOK, for the State.

TRIPPE, Judge.

The defendant (plaintiff in error,) had, before this trial, been prosecuted, convicted and punished for the same offense by a Court which had jurisdiction of the case. It is true that the conviction and punishment was by an Inferior Court, of limited jurisdiction, with power given by a special statute to take cognizance of such cases, and that, at the same time, this indictment was pending in the Superior Court. But it does not appear from the record that the defendant had ever been arrested under the indictment, or even had notice of it, or that the Court which tried him had notice of an indictment then pending against him for the same offense. Under this state of facts, it would have been not only hard on the defendant to be twice tried, convicted and punished for the same offense, simply because one Court commenced the prosecution before the other which tried him did, but would seem to subordinate that cardinal provision in the declaration of fundamental principles, older than any American Constitution, that no person shall be put in jeopardy of life or liberty more than once for the same offense, to a mere technical rule, to-wit: that the Court first obtaining jurisdiction shall retain it.

In the case of the State vs. Tisdale, 2 Devereaux & Battle, 159, the defendant was indicted in the Superior Court and pleaded thereto a former conviction in the County Court for the same offense. To this plea a replication was filed by the State,

that the present indictment was found against the defendant before prosecution was commenced in the County Court, and had been regularly kept up. Defendant rejoined to the replication, that he had no legal notice of the indictment in the Superior Court before his conviction in the County Court. There was a demurrer to this rejoinder, which was overruled by the Court below, and judgment given for defendant. This was affirmed by the Supreme Court of North Carolina. The subsequent case in the same Court, of the State vs. Casey *et al.*, Busbee's Reports, 209, was exactly like the former, except that the replication to the plea charged the defendants with knowledge of the bill pending in the Superior Court, and that they procured the prosecution in the County Court, and voluntarily submitted thereto, and paid the fine imposed by that Court. A demurrer was sustained to this replication, and the judgment affirmed. The Supreme Court of North Carolina, in their opinion, say "The replication does not state that the defendants had been arrested upon a *capias* issued from the Superior Court before they were indicted in the County Court, and we must take it that the fact was not so. Their knowledge of the bill having been found in the Superior Court cannot, then, vary the result. As was said in the State vs. Tisdale, the defendant had no day in the Superior Court, he having neither been arraigned, or even arrested, on the bill in that Court. Until he had a day in Court on that indictment, he was not *vezatus* thereby, and stood in relation thereto on the same footing as if he had been put without day, by a *nolle prosequi* thereon."

The Court then proceed to say, "How the other allegation, that he procured an indictment to be found against him in the County Court, and submitted thereon, can alter the case, we cannot imagine. Certainly it is no fraud on the law for a man who has violated it to come forward and voluntarily submit to the judgment of a Court having full jurisdiction of the offense. The Legislature, by giving a concurrent jurisdiction to the County and Superior Courts over assaults and batteries, assumes that either, and not one more nor less than

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the other, will fully exercise its powers and perform its duties. But it is said that persons committing aggravated batteries may, and often do, by the means resorted to in this case, manage to escape with a lighter punishment in the County Court than would have been imposed in the Superior Court. This may be so, and if it is so, it is an evil which it is the province of another department of the government to redress."

This long extract is given because it covers the whole question, and contains the *gist* of the whole matter. We are constrained, upon principle, to hold as the Supreme Court of North Carolina held, and say as they did, that if evil threatens to flow from it, the correction of that evil belongs to the Legislature. We cannot shape decisions to meet a policy which it is exclusively the duty of the Legislature to regulate.

We know that in the case of *Burdette vs. The State*, 9 Texas, 43, a contrary holding was made. But the decision is contained in a few lines, and is solely put on the ground, "that the Court first exercising jurisdiction acquires control of the case to the exclusion of the other." That principle is recognized, but we do not think it applies, so as to permit a plaintiff in a civil case to obtain two judgments for the same claim against the same defendant, unless it be in certain cases specially provided for. Even when that can be done, the satisfaction of one judgment is a discharge of both. Nor should the State be permitted to impose a double penalty for the same offense, and that too in a case wherein it does not appear that the defendant had been arrested under the first indictment.

Judgment reversed.

OSCAR E. BESORE, plaintiff in error, vs. TALLULAH E. BESORE, by her next friend, defendant in error.

1. An infant married woman may maintain an action for a divorce.
2. The discretion of the Superior Court as to the amount allowed as temporary alimony will not be interfered with unless abused.

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3. Temporary alimony for the wife should embrace a reasonable allowance for her support pending the litigation, taking into consideration her physical condition and ability to contribute something towards her own support.

Husband and wife. Divorce. Alimony. Infant. Before Judge HILL. Bibb Superior Court. April Term, 1873.

For the facts of this case, see the decision.

LYON & IRVIN, for plaintiff in error.

POE & HALL, by Z. D. HARRISON, for defendant.

WARNER, Chief Justice.

The complainant having filed her libel for divorce against the defendant, made application to the Court for the allowance of temporary alimony, and for payment of counsel fees. The Court below, after hearing evidence as to the amount of the defendant's property, and the condition of the parties, ordered that the defendant should pay the plaintiff \$45 00 per month for temporary alimony, and should pay to her counsel \$150 00, as a retaining fee in the libel suit for divorce, to which the defendant excepted. The defendant also made a motion to dismiss the whole proceeding, on the ground that an infant married female, under twenty-one years of age, could not maintain an action of libel for divorce against her husband, which motion was overruled, and the defendant excepted.

1. If the wife is of sufficient age to enter into a marriage contract, no good reason occurs to us why she may not maintain an action in the Courts to dissolve it, for any of the causes authorized by the laws of the State. Marriage contracts and settlements made by infants who are of lawful age to marry, are binding, as if made by adults: Code, section 2692. The complainant in this case was of lawful age to contract marriage and to make a marriage settlement, and such contracts made by infant females being as binding upon them as if made by adults, it would seem that they would be as competent to

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maintain an action to dissolve the marriage contract, for any of the causes authorized by law, as an adult married woman would be. If an infant married woman is bound by the contract as an adult married woman would be, it is difficult to perceive why she should not have the same right to prosecute a suit for a dissolution of that contract as an adult married woman would have. There was no error in overruling the motion to dismiss the proceedings.

2. We cannot say that there was such an abuse of the discretion of the Court below in allowing the temporary alimony in this case as would authorize this Court to interfere and control it, although we should have been better satisfied if the amount allowed had been less, but as it is in the discretion of the Court to modify its order from time to time, as the condition and circumstances of the parties may require, we will not interfere to control it. Courts cannot be too careful in granting temporary alimony and counsel fees in applications for divorce, so as not to encourage the dissolution of the marriage contract for mercenary considerations, the more especially when the amount is to be paid out of the property of the husband, when the wife had no property at the time of the marriage, as in this case.

3. A reasonable allowance for her support pending the litigation should be made, taking into consideration her physical condition and ability to contribute something towards her own support in the meantime. Every case, however, must depend on its own merits and the particular circumstances connected with it, as well as the rank and condition in life of the parties.

Let the judgment of the Court below be affirmed

JOHN M. GUNN *et al.*, plaintiffs in error, vs. R. T. THORNTON, defendant in error.

1. The sale of a homestead in February, 1871, under the 12th section of the Homestead Act of 1868, did not discharge it from the lien of judgments then existing against the owner thereof, which were founded on

debts created prior to the time when the present Constitution went into operation.

2. Where the purchaser of the homestead gave his note for a portion of the purchase money, and a judgment creditor of the vendor sued out a garnishment and obtained judgment thereon against the purchaser for the amount of the note prior to the decision of the Supreme Court of the United States, in the case of *Gunn vs. Barry*, and afterward levied the judgment against the vendor on the land, equity will enjoin him from enforcing the judgment obtained on the garnishment for the unpaid portion of the purchase money.
3. The complainant in this case does not show that he had put improvements on the land of such character and to such an extent as will entitle him to an accounting therefor, for reimbursement.
4. What the rights of the purchaser may be, as to the proceeds of the sale by the sheriff under the judgments against the vendor of property purchased by him with the money that has been paid by such purchaser, we do not now determine, as that question is not properly made in the record for a decision by this Court. If there be such a sale, he can be heard when the question as to the distribution of the money arises.

Constitutional law. Homestead. Garnishment. Vendor and purchaser. Before Judge STROZIER. Randolph County. At Chambers. September 15th, 1873.

R. T. Thornton filed his bill against John M. Gunn, George W. Coxwell and George B. Swan, containing, substantially, the following allegations :

That the defendants, holding certain judgments obtained by them, respectively, in November and May, 1867, and May, 1869, *vs. Henry J. Fillingin*, have recently had them levied on certain lands, which having been, since the Georgia Constitution of 1868, set apart as a homestead to said Fillingin, had been bought by complainant from said Fillingin, for \$2,000 00, and conveyed, on February 2d, 1871, to him by deed of said Fillingin and wife under the approval of the Ordinary, he believing, from the then prevailing decisions of the Courts of this State, that said lands could not be subjected to said judgments, and, under this impression, paying all the purchase money except some \$389 00, and interest.

That prior to the decision of the United States Supreme

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Court, in *Gunn vs. Barry*, holding such property subject to such debts, complainant had placed improvements on said lands to the value of \$925 00, in clearing, fencing and fertilizing, and in repairs, and the building of some cabins, whereby the value of the lands had been enhanced.

That, according to complainant's information, said Fillingin invested a large part of said purchase money in land and personal property now in his possession, and which, with complainant's note for the balance of said purchase money, have been set apart as homestead and exemption to said Fillingin, all of which property, added to said lands bought by complainant from him, would not over-pay said judgments.

That Coxwell's judgment is void, because being rendered at May term, 1869, it was not signed by the Judge, but by E. L. Douglass, plaintiff's attorney.

That Gunn, as a means of collecting so much of his judgment aforesaid, garnished complainant, and, without defense, obtained a judgment against him for the amount of said note for the balance of the purchase money, and has also levied his original judgment on the said property now held by Fillingin.

Upon said allegations, and upon complainant's offer to pay into Court, for the said creditors, the sum due on the note aforesaid, he prays that defendants be perpetually enjoined from enforcing their judgments upon the lands first aforesaid; that if allowed at all to sell said lands, it may be only on condition of paying to complainant the value of his said improvements; that Gunn may be enjoined from proceeding upon his said garnishment judgment; and that Coxwell's judgment may be decreed void.

The defendants demurred to the bill. The demurrer was overruled and the injunction granted as prayed for. To which decision the defendants excepted.

JOHN T. CLARKE; A. HOOD; E. L. DOUGLASS, for plaintiffs in error.

H. & I. L. FIELDER, for defendant.

TRIPPE, Judge.

1. Some of the judgments sought to be enjoined were obtained before the assignment of the homestead to Fillingin and wife. All of them were rendered before the sale to Thornton, and were for debts contracted before the present Constitution went into operation. Whilst Fillingin held the property, it was subject to the judgments. The conveyance by him and wife, though by the approval of the Ordinary, did not discharge it from the lien of judgments which had already attached.

2. Thornton, the purchaser of the homestead, gave in part payment therefor, his promissory note. Gunn, one of the creditors, sued out a garnishment against Thornton on his judgment. He has obtained judgment against Thornton for the amount of his note. This was before the decision of the Supreme Court of the United States in *Gunn vs. Barry*. Since that decision was rendered, and since the judgment was obtained against Thornton in Gunn's favor for Thornton's note for part of the purchase money of the land, Gunn has levied his execution on the land. Fillingin and wife have also sued Thornton on the note, and are insolvent. Under these facts, it would be inequitable for Gunn to sell the land under his judgment, thereby vacating Thornton's title, and at the same time force Thornton to pay him the unpaid portion of the purchase money for the same land. He should not deny and set aside Thornton's title, and also recover from him the fruits of that which he has rendered valueless. Thornton's vendor's being insolvent, he can have no indemnity from them. The question as to Thornton's right to enjoin the suit of Fillingin and wife on the note, is passed upon in another case, brought by a separate writ of error sued out by them from the same decision—all having been parties to the same proceedings in the Court below.

3. The claim set up by complainant for reimbursement is mainly for fencing, repairing fences, clearing part of the land and for fertilizing. One or two log cabins were also built.

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Thornton made the contract for the purchase in October, 1869. He has had the use of the land for three years. Most of the work he has done was to render the land more available to him for the purposes of cultivation, and we do not think they come within the character of that kind of improvements upon which can be based a claim for reimbursement.

4. What the rights of Thornton, the purchaser, may be as to the proceeds of the sale of the property purchased by Fillingin with the money paid for the homestead, we do not determine. That question is not made in the record so that it can be properly passed upon here. The judgment of the Court below does not affect the rights of either party upon that point, nor does the injunction which was granted reach that question. The injunction should be modified so that it shall restrain the enforcement of Gunn's judgment against Thornton, obtained in the garnishment proceedings.

HENRY J. FILLINGIN, plaintiff in error, *vs.* R. T. THORNTON,
defendant in error.

A State Court will not grant an injunction restraining a party from applying for the benefit of the Bankrupt Act under the bankrupt law of the United States.

Injunction. Bankrupt. Before Judge STROZIER. Randolph county. At Chambers. September 15th, 1873.

Thornton filed his bill against Fillingin, and others, who have no part in the issue here involved, making substantially this case:

Fillingin had a homestead in real and personal property set apart to him under the Act of 1868. On February 2d, 1871, complainant, under the provisions of said Act for the sale of homesteads, purchased the land so set apart at and for the sum of \$2,000 00, of which purchase money he has paid all but \$389 00. He took a deed to said property from the defend-

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ant and his wife, under the approval of the Ordinary. The defendant has invested the moneys realized as aforesaid from the sale of said homestead, in land and personalty, now in his possession. The Homestead Act of 1868 has been declared unconstitutional by the Supreme Court of the United States, so far as judgments were concerned, obtained prior to the adoption of the Constitution of 1868, and several of such judgments against the defendant have, in consequence of said decision, been levied upon the homestead purchased as aforesaid by complainant. In equity, the property purchased with the proceeds of said homestead, should be sold and all the moneys arising therefrom applied to the payment of said judgments. But to prevent this result, the defendant has threatened to avail himself of the benefits of the Bankrupt Act of the United States, and to claim said property, now in his possession, purchased as aforesaid, as exempt under the provisions of the said Act. Amongst other things, the complainant prayed that the defendant be enjoined from filing a petition in voluntary bankruptcy, and from claiming said property as exempt.

The Chancellor granted the injunction as prayed for, and the defendant excepted.

WORRILL & CHASTAIN, for plaintiff in error.

H. & I. L. FIELDER, for defendant.

TRIPPE, Judge.

The Constitution of the United States grants the power to Congress to establish "uniform laws on the subject of bankruptcies throughout the United States." Congress has exercised this power and enacted a general bankrupt law for the United States. The State Courts will not grant an injunction restraining a party from applying for the benefit of that Act. No precedent or reason for the exercise of such a power by a State Court was shown in the argument. In truth, all analogous precedents and authorities are to the contrary. The

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fact, that under the bankrupt law, the applicant may have rights that he could not secure under the State law, furnishes no ground. A State may not discharge a debtor from all liability for his debts, whilst that is one of the chief objects of a bankrupt law, and the special object of the debtor who seeks the benefit of the Act. The judgment of the Chancellor, so far as the injunction operates to restrain Fillingin from making application for the benefit of the bankrupt law, is reversed.

The bill charges the insolvency of Fillingin and wife. The facts are more fully set out in the case of *Gunn et al. vs. Thornton et al.*, decided at the present term. That case and this were brought up by separate bills of exceptions sued out from the decision of the Chancellor, made upon the same bill for injunction, filed at the instance of the defendant in error. The parties to both cases were all parties to the same proceedings below, and that case is referred to for a fuller statement of the facts on this point.

We think the Chancellor committed no error in granting the injunction, so far as it restrains Fillingin and wife from collecting the note given by Thornton for a portion of the purchase money of the homestead.

Injunction modified.

JAMES P. GRAVES, plaintiff in error, vs. JOHN T. WINGFIELD, executor, defendant in error.

The aid or comfort given by the plaintiff in the judgment to the Confederate Government, or to its soldiers, such as the payment of taxes, the furnishing of slaves to work on fortifications, the speaking in favor of the government, or the war, the furnishing of provisions to the government and its soldiers and their families, although voluntarily done, was not sufficient to entitle the movant to have the judgment reduced under the Relief Act of 1868, as such acts did not sufficiently connect the plaintiff with the losses sustained by the movant.

Relief Act of 1868. Judgment. Confederate States. Before Judge CLARK. Lee Superior Court. March Term, 1873.

For the facts of this case, see the decision.

FREDERICK H. WEST; RICHARD F. LYON, for plaintiff
in error.

G. W. WARMOCK; VASON & DAVIS, for defendant.

WARNER, Chief Justice.

This was an application to reduce and scale a judgment obtained on a debt contracted prior to the 1st of June, 1865, under the provisions of the 2d section of the Relief Act of 1868. On the trial of the issue, the Court charged the jury that no aid or comfort given by the plaintiff in the judgment to the Confederate Government, or to its soldiers, such as the payment of taxes, the furnishing slaves to work on fortifications, the speaking in favor of the government, or the war, the furnishing provisions to the government and its soldiers and their families, although voluntarily done, was not sufficient to entitle the movant to have the judgment reduced under the Relief Act of 1868, as such acts did not sufficiently connect the plaintiff with the losses sustained by the movant. To which charge, the movant excepted. According to the rulings of this Court heretofore made in similar cases, under the provisions of the Relief Act of 1868, there was no error in the charge of the Court to the jury, in view of the facts disclosed by the record: *Gunn vs. Hendry*, 43 Ga. R., 556. In view of the previous rulings of this Court upon the question made in the record, ten per cent. damages is awarded for delay, as provided by the 4221st section of the Code.

Let the judgment of the Court below be affirmed, with damages.

Wooten *et al.* vs. Archer.

JOSEPH W. WOOTEN *et al.*, plaintiffs in error, vs. ELIZA ARCHER, defendant in error.

1. To entitle a mechanic to a summary enforcement, under section 1969, of the Revised Code, and Act of 16th September, 1870, of a lien claimed by him, it must appear in the proceedings that the claim is for the labor of the mechanic himself, or for material furnished by him.
2. A and B, mechanics, sued out an execution, which was void under the foregoing rule, against T. A., and a house built under a contract with him. The execution was levied on the house. It was sold by the sheriff and bought by Wooten & Taylor, the defendants. The lot on which the house stood belonged to E. A., who brought ejectment against Wooten & Taylor. The defendants set up, by plea, that E. A. lived adjoining to the lot where the house was being built, and never gave notice of her right or title, and that from such default on her part, the builders would, in equity, have a lien on the house for the unpaid portion of their claim, and that the purchasers at sheriff's sale should be subrogated to their rights and allowed the amount that was due the builders. T. A., who had the house built, was not a party to the cause, nor did it appear what the debt against him was, except by the illegal proceedings to enforce the lien claimed :

Held, That even if the defendants could, with proper parties and proof, assert such an equity, yet it was necessary that T. A. should have been made a party, and the amount of his debt due the builders should have been shown by evidence other than the void proceedings to enforce the mechanic's lien.

3. Where the case stated in the body of the bill of exceptions is different from that stated in the certificate of the clerk thereto, and in the record, the error in the bill of exceptions is amendable so as to conform to the record. See end of Report. (R.)

Mechanic's and laborer's lien. Equity. Parties. Estoppel. Before Judge HOPKINS. Fulton Superior Court. October Term, 1872.

Eliza Archer brought ejectment against Joseph W. Wooten, Clinton Taylor and Thomas Sharp to recover a lot on Broad street, in the city of Atlanta, with its appurtenances, and also *mesne* profits. The action was commenced in September, 1871. According to the record, the case was in default. According to the bill of exceptions, the defendant pleaded the general issue and two special pleas.

The special pleas were as follows : 1st. That defendants are

purchasers of the improvements upon the premises in dispute, under foreclosure of mechanic's lien for erecting the same, by Alexander & Broomhead against Thomas B. Archer, which improvements cost and are of the market value of, \$3,000 00, or other large sum, no part of which was paid by plaintiff, which will be wholly lost by defendants if a general verdict at law for the premises in dispute is rendered. Wherefore, they pray that a sale of the whole property may be required by the verdict, and they receive their *pro rata* upon the value of the land and improvements, which improvements occupy the whole land. 2d. That Thomas B. Archer, son of plaintiff, being in possession of the premises in dispute by contract of rent, and also being, by the will of Washington E. Archer, under which plaintiff claims a life estate, a remainderman, said premises being unimproved and attached and adjoining the stable property of said W. E. Archer, employed Alexander & Broomhead, mechanics, to erect a three-story brick building thereon, which was done and completed during said term of renting, and the cost thereof, except the principal sum of \$732 00, was paid to said Alexander & Broomhead by said Archer; that Alexander & Broomhead, for said balance, foreclosed their mechanic's lien against said Thomas B. Archer and said improvements, and had the improvements sold by the sheriff under the same, on the 6th of June, 1871, when the defendants became the purchasers for \$800 00, and took the sheriff's deed thereto; and in addition, they purchased and paid for, to said Thomas B. Archer, all his interest in and to said lot and improvements, he conveying the same to them by deed; that said Thomas B. paid out of his own funds for said improvements all that they cost, except the said balance, by reason of all which facts, the defendants are entitled to all the rights of the said Thomas B. and of Alexander & Broomhead in said improvements; that the lot was used before these improvements for the purposes of said stable, and that the improvements were further to advance the value and use of the same, and that the plaintiff resided over the stables, and on the next lot to the improvements, all the while they were

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being erected, and never notified the mechanics not to proceed, nor in any other way communicated to them or to the defendants her objection; that when they were advertised at sheriff's sale, and on the day they were sold, she still so resided, and never made any objections to the sheriff, or the plaintiffs, or to any one else, but permitted all to proceed until September afterwards, when suit was begun. Wherefore, the defendants submit that plaintiff cannot recover the premises in dispute without a finding to indemnify them for their loss and outlay, and the advanced value of the life estate by reason of the same.

At the trial, the plaintiff introduced certain evidence to show title to the premises in dispute, a part of which evidence was the will of her former husband, Washington E. Archer, by which she took a life estate, with remainder to her son Thomas B. and others. She was examined as a witness in her own behalf, and testified thus: "I am the widow of W. E. Archer, deceased; reside in Atlanta, on Alabama street, upon the property known as the Archer Livery Stable; am the mother of Thomas B. Archer; I know the property sued for—live where I could and did see it; said to son Thomas B. not to build the house, that it would ruin him to do so; never said to any mechanic, neither Alexander & Broomhead, nor any others engaged in the erection of the building to desist from the same, nor notified any of them not to erect the building or do the work; I resided all the time of the erection of the building where I could have seen it, and did see it, in course of erection, but resided in one of the front rooms and did not see the building until it approached completion; never interposed any claim or took any other legal proceedings or made any objection to the sale by the sheriff; was residing at the same place while the sale was in progress, and knew the sale was to take place. The lot in suit is a part of the Archer Stable property. All said property, including this lot, was rented by me to my son Thomas B., until the 15th day of June, 1871, and he took possession and continued so

in possession by himself and his tenants, up to said sheriff's sale."

A. W. Holcomb testified that the land for rent was worth \$10 00 or \$12 00 per month; and, improved as it is, \$40 00 per month; that it is a part of the stable property, and was used as a mule or stock lot prior to the erection of the building.

The defendants opened their case on the plea of the general issue. They tendered in evidence a lease from the plaintiff to themselves, dated March 11th, 1871, covering the said stable property on Alabama and Forsyth streets, but not that portion lying on Broad street, the premises in dispute. This lease was to run for the term of one year, from June 15th, 1871, with the privilege of extension to five years. They also tendered at the same time a claim of lien filed and duly recorded by Alexander & Broomhead, as mechanics, for erecting said building, and furnishing materials, with an affidavit made by Broomhead before the Judge of the Superior Court, to foreclose and enforce said lien, and a sheriff's deed to the defendants, made under a sale based on such foreclosure. The claim of lien and the affidavit (one dated December 28th, 1870, and the other May 8th, 1871), covered both the lots sued for, and the buildings erected thereon, as the property of Thomas B. Archer. The debt specified in the claim of lien was \$1,416 00, but in the affidavit it was reduced to a balance of \$732 00, besides interest. The sheriff's deed covered the building but not the lot. It bore date June 6th, 1871, and recited a sale of the building to defendants as the property of Thomas B. Archer.

All this evidence was objected to by plaintiff's counsel, because not available under the general issue. The objection was sustained by the Court. To meet this ruling the defendant filed the first special plea above set forth, and again tendered the same evidence, at the same time accounting for the loss of the *fi. fa.* set forth in the sheriff's deed, and obtaining from the Court express permission for the cause to proceed as though the *fi. fa.* were in evidence. The lease and the claim

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of lien were received, but the other two papers, to-wit: the affidavit and the sheriff's deed were objected to by plaintiff's counsel, on the ground that they were void and conveyed no title or interest to the defendants. The objection was sustained by the Court, and the defendants excepted.

The defendants then amended their pleadings by adding the second special plea and again offered in evidence said affidavit and sheriff's deed for the purpose of showing that they stood in the shoes of Alexander & Broomhead, as to the balance not paid to the latter by Thomas B. Archer for the building, and, also, as to the residue of the value of the improvements, that the defendants should, on principles of equity, be allowed a decree therefor, before being dispossessed, and that upon like principles, they were not liable for rent, except in proportion to their interest as compared with the plaintiff's interest. To sustain this view of the case, the evidence was admitted by the Court.

A. B. Culberson testified that he, for defendants, paid the money to the sheriff, as recited in the sheriff's deed.

The Court charged the jury, in accordance with the rulings made in the progress of the cause, in favor of the legal rights of the plaintiff, to recover the premises and rent, but not so as to be subject to any exception for the expression or intimation of an opinion as to what had been proved. In regard to the equitable defense set up, he simply charged that if the plaintiff, by any act of hers, influenced the defendants to make the purchase at sheriff's sale, she would be liable to them for the money she may have induced them to pay out, and they might recover in this case and have a lien on the lot declared in the verdict for it; that the jury might render such verdict as would do equity between the parties. To which charge the defendants excepted, as erroneous generally, and specifically in that it did not submit for the consideration of the jury their legal rights under the evidence.

The verdict was in favor of the plaintiff for the premises and \$780 00 *mesne* profits.

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Error is assigned upon each of the aforesaid grounds of exception.

When this case was called, a motion was made to dismiss the writ of error, upon the ground that the case recited in the body of the bill of exceptions was different from that stated in the record which purported to belong to it; that if the Court proceeded to try the case stated in the bill of exceptions, there was no record; that if the case set forth in the record was taken under consideration, there was no bill of exceptions.

The facts upon which this motion was based were as follows:

The bill of exceptions stated that "there came on to be tried," etc., "the ejectment suit of Eliza A. Archer against Wooten & Taylor, former partners in the livery stable business, for a city lot," etc. The certificate to the bill of exceptions by the clerk, states the case as that of "John Doe (on the demise of Eliza Archer,) vs. Richard Roe, Joseph W. Wooten, Clinton Taylor and Thomas Sharp." The record throughout, including clerk's certificate, shows the case to be as stated in the certificate to the bill of exceptions.

Counsel for plaintiffs in error moved to amend the bill of exceptions by the record. The amendment was allowed, and the motion to dismiss was withdrawn.

R. H. CLARK; A. B. CULBERSON, for plaintiffs in error.

L. E. BLECKLEY, for defendant.

TRIPPE, Judge.

1. In the case of *The Savannah and Charleston Railroad Company vs. Daniel Callahan*, decided at the present term, it was held, that the Act of 1869 only gives a summary remedy for the enforcement of mechanics' and laborers' liens upon the property of their employers, when the debt is due for the labor actually performed by them, and the materials furnished by them, with which and upon which the labor has been per-

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formed. The lien is given and the summary remedy allowed, to secure the debt due to the laborer or mechanic for his own labor and materials furnished by him, in the performance of the labor for which the debt is due. The Act of 1869 provides that "such liens may be enforced in the manner prescribed in the 1969th section of Irwin's Revised Code, upon the subject of enforcing liens against steamboats." That section says that the person prosecuting such lien must make an affidavit "showing all the facts necessary to constitute a lien under this Code." The Act of September 16th, 1870, entitled "An Act to alter and amend an Act for the enforcement of liens," etc., uses the same expression, and requires the affidavit to "show all the facts necessary to constitute a lien," etc. According to these provisions, the proceedings for the enforcement of the lien claimed in this case, did not show all the facts necessary to constitute a lien, and could not, therefore, be the foundation for issuing a valid process for the sale of property under it. Where such extraordinary and summary process is given, the statute granting it should be strictly complied with. The proceedings should show that the claim is for the labor of the mechanic himself, or for materials furnished by him, as held in the case referred to.

2. But the defendants set up in their plea and evidence, that as Mrs. Archer was in default, in not giving notice of her title, the builders would in equity have a lien on the house for the unpaid portion of their claim, and that the purchasers at sheriff's sale should be subrogated to their rights. To have accomplished this, it was necessary that Thomas Archer should have been made a party. He was interested in the issue. The amount of his debt was to be ascertained, and to that extent, at least, he had an interest. He had also a remainder interest in the property after the termination of his mother's life interest. There was no legal evidence of this debt before the Court. If the proceedings to enforce the alleged lien were insufficient for the purpose for which they were instituted, they were not competent evidence to establish the debt. So that granting the equity claimed could have

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been enforced with proper proof and proper parties, there were not before the Court the evidence and the parties necessary to authorize the recovery asked for by the defendants.

Judgment affirmed.

JOSEPH W. HUFF, plaintiff in error, vs. ANDREW J. ODOM, defendant in error.

1. Title to personal property by capture on land during a war, can only be set up by the organized and recognized parties to the war, or by those acquiring title from them, according to the orders and regulations prescribed by the governments and their military authorities.
2. An immaterial error is no ground of new trial.

War. Capture. Title. Confederate States. New trial. Before Judge JOHNSON. Muscogee Superior Court. October Term, 1872.

For the facts of this case, see the decision.

JOSEPH F. POU, for plaintiff in error.

JAMES M. RUSSELL, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendant to recover the possession of a mule, or the value thereof, which the defendant had in his possession, under a possessory warrant sued out against the plaintiff therefor. The plaintiff proved that he purchased the mule from one Baugh, in Columbus, in February, 1871, for which he paid \$165 00. The defendant proved the possession and ownership of the mule in April, 1865; that the mule disappeared from his possession, and never saw it until he found it in the possession of the plaintiff in February, 1871. It was further shown by the defendant that the mule was taken from his possession in April, 1865, by some men dressed as Federal sol-

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diers, who took it to Macon and put it up with others, and was then sent off to Atlanta and there sold at *private* sale for \$160 00. There were no officers with the men who took the mule from defendant's possession—were all privates. The Court charged the jury, that if they believed the mule in controversy to be the same one taken from the defendant by Federal soldiers in April, 1865, the title of defendant was not divested, unless the same was condemned by a Court of competent jurisdiction, and that the plaintiff acquired no title by his purchase from Baugh, unless the same appeared; to which charge the plaintiff excepted.

1. Although the charge of the Court may have been correct as to the capture of property on the high seas by the maritime power of the Federal government, we do not think it was applicable to the capture of personal property on land by that government, but the personal property captured on land by the regular organized authority of the Federal government should be disposed of according to the orders and regulations prescribed by the government and its military authorities, for that purpose. In this case, the plaintiff does not pretend to derive his title to the mule from either the civil or military authorities of the Federal government, or from any one claiming title therefrom, if, indeed, the mule had been lawfully captured by the military authority of that government, which it had not, according to the evidence in the record. In *Worthy vs. Kinamon*, 44 *Georgia Reports*, 297, this Court held that title by capture, during a war, can only be set up by the organized and recognized parties to the war, or by those claiming and acquiring title from said organized and recognized parties.

2. Although the Court may have erred in charging the jury that condemnation of the mule by a Court of competent jurisdiction was necessary to divest the title of the defendant, still, the verdict was right, under the law and facts of the case, and we will not disturb it.

Let the judgment of the Court below be affirmed.

GAZAWAY L. MILLEDGE, plaintiff in error, vs. JANE BRYAN,
defendant in error.

1. A trust deed gave power to the trustees to mortgage or sell land to pay a debt of the grantor, and to raise a specified amount to be paid to the grantor, or to C. M., as either might order. The income from the balance of the trust property was to be paid to the grantor, or to said C. M. The *corpus* was to be conveyed by the trustees to such persons as the grantor might, during life or by will, appoint. If the grantor died intestate, then to hold for C. M. and her children then living, free from the debts or control of the husband of C. M. The grantor died intestate, and without executing the power of appointment. C. M. and her four children survived :

Held, That at the death of the grantor the children of C. M. took a present interest in four-fifths of the property, the trust as to which interest was determined, and the legal estate therein vested in the children.

2. In such a case, a Judge of the Superior Court did not have power, on the resignation of the trustees, after the death of the grantor, to appoint a successor in the trust for the children, and on a bill filed by the *prochein ami* of the mother and children, in their name and by her consent, to grant an order in Chambers, authorizing the trustees to mortgage the whole estate, either to pay a debt or to raise money to educate the children.

Trusts. Equity. *Prochein ami*. Before Judge SCHLEY.
Chatham Superior Court. January Term, 1873.

Gazaway L. Milledge brought ejectment against Jane Bryan to recover an undivided fifth of certain lands situated in Chatham county.

The defendant pleaded, 1st. Not guilty. 2d. That the suit, though having for its object the enforcement of rights which accrued prior to June 1st, 1865, was not brought until after January 1st, 1870.

The following is an abstract of the evidence for the plaintiff:

1st. A trust deed from Mary Milledge to John W. Anderson, Francis S. Bartow, and Charles A. L. Lamar, dated February 16, 1853, whereby she conveyed to them certain lands in Chatham county, of which the land in question is a part, to have and to hold the same, with the appurtenances, etc., unto them and their successors in the trust, their heirs and assigns forever, upon the following trusts, viz:

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"In trust, to grant, bargain, sell, lease, mortgage, or otherwise dispose of said lots, in whole or in part, and in such manner, or upon such terms as to the said parties of the second part may seem meet and proper, and to apply or hold the money thus realized in manner following, to-wit: first, to the payment and discharge of a mortgage upon said lots from said Mary Milledge to said John W. Anderson, dated the 8th day of January, 1853, to secure the payment of a note of \$4,500 00, bearing the same date with said mortgage, and due sixty days after date, and then to pay the sum of \$3,000 00 to the said Mary Milledge, or to the written order and receipt of Catharine Milledge, the wife of John Milledge, jr., of said county of Richmond, or to such other person or persons as they, or either of them, may in writing direct, and to invest the residue of said money in such stocks or other securities, or in such real or personal estate, paying at least a semi-annual income, as to the said parties of the second part may seem most suitable, and to pay the income arising from said installments, when made, and also of such portion of the property herein originally conveyed as shall remain unsold, to and upon the written order of the said Mary Milledge, the party of the first part, or upon the written order and receipt of Catharine Milledge, the wife of said John Milledge, jr.; the money thus paid to the said Catharine Milledge, wife of said John, to be made over to her sole and separate use, and not in any wise subject to the debts, contracts, or control, of her said husband, and upon the further trust that the said parties of the second part shall and will hold the principal money arising from the sale and lease of said lots, after the payment of said sum of \$7,500, as aforesaid, and such of said real estate hereby conveyed and remaining unsold, to and for the use and benefit of the said party of the first part, and to convey the same to such person or persons as the said party of the first part may during her lifetime appoint, or whom she may designate in her last will and testament, and upon such conditions as may be therein declared; and in case the said party of the first part should die intestate, then to hold the same for the said Catharine Mil-

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ledge, wife of said John, and for the children of the said John and his said wife, living at the time of the death of said party of the first part, free from all control or liability on account of the debts or contracts of said John Milledge. And it is hereby expressly declared that the said parties hereto of the second part, or any further trustees hereof, shall not be held responsible for the acts of each other, but that they shall be severally accountable to the parties in interest for such sums of money as may have been received by each individually. And it is further declared and agreed that if all or either of the trustees hereby appointed shall die or resign the trusts hereby created, that the place of the trustees resigning or dying may be supplied by such person or persons as the said Mary Milledge may, in writing, nominate; and the person or persons thus nominated and accepting the trust shall have all the powers and authorities which he or they would have had, were they the original trustees herein."

2d. Depositions of Catharine H. Milledge. "I know of the trust deed. I am the Catharine Milledge therein mentioned as the wife of John Milledge, jr. Mary Milledge and my husband were cousins, and I knew her well, of course. She died September 28, 1856. My husband died May 13, 1872. We had four children living at the time of Mary Milledge's death, viz.: John, Kate, Richard, and G. L. Milledge. The last named is the plaintiff in this suit. They are all now living. Gazaway L. is the youngest. He was born May 30, 1849. My husband was a citizen of Richmond county during the years 1857 and 1858. I knew John C. Snead. He was no relation or connection of ours, but was once a law partner of my husband. I think he resided in Augusta in 1857."

On the cross-examination, the witness said: "I knew the said Anderson, Bartow, and Lamar. I believe they are now dead. They resided in Savannah."

3d. The defendant then admitted that the land sued for was a part of the land included in the above trust deed, and that the defendant was in possession at the time the suit was brought.



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FOR THE DEFENDANT.

1st. Petition of the above named Anderson, Bartow, and Lamar, and others, for the appointment of John Milledge to be trustee under said deed, in their stead, and order thereon, as follows :

"CHATHAM SUPERIOR COURT, MAY TERM, 1857.

"In Chatham Superior Court, ex parte John W. Anderson et al.

"GEORGIA—CHATHAM COUNTY :

"To the Honorable the Judge of the Superior Court of said Chatham county, having jurisdiction in equity :

"The petition of John W. Anderson, Francis S. Bartow, Charles A. L. Lamar, John Milledge and Catharine, his wife, respectfully sheweth, that on the 16th day of February, in the year 1853, Mary Milledge, of the county of Richmond and State of Georgia, in and by a certain indenture conveyed to your petitioners, John W. Anderson, Francis S. Bartow and Charles A. L. Lamar, certain real estate situate in the said county of Chatham, to be by them held in trust for your petitioner, Catharine Milledge, wife of said John Milledge, and her children, free from the debts or obligations of said John Milledge; and your petitioners further show that the said John W. Anderson, Francis S. Bartow and Charles A. L. Lamar assumed the trusteeship cast upon them in and by said deed, and have borne the duties of the same up to the present time; that in and by one of the clauses of the said trust deed, it is declared, 'that if all or either of the trustees hereby appointed shall die or resign the trusts hereby created, that the place of the trustee resigning or dying may be supplied by such person or persons as the said Mary Milledge may, in writing, nominate;' and your petitioners further show that the said John W. Anderson, Francis S. Bartow and Charles A. L. Lamar, trustees as aforesaid, are desirous of resigning, and do hereby resign, their said trusteeship, and beg to be discharged from the same; and that your petitioner, Catharine Milledge, is willing they should do so, and hereby consents

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thereto, and is further desirous that her husband, the said John Milledge, should be, by this honorable Court, appointed trustee, under the said deed, in their place and stead; and your petitioner, John Milledge, hereby consents to accept the said trusteeship, and to discharge the duties of the same; and your petitioners show here to your Honor that, in consequence of the aforesaid resignation by the said trustees, the said trust estate is unrepresented, and your petitioners bring here and show to your Honor the said original trust deed from the said Mary Milledge; and your petitioners will ever pray, etc.

(Signed)

"CATHARINE G. MILLEDGE,

"JOHN MILLEDGE,

"C. A. L. LAMAR,

"FRANCIS S. BARTOW,

"JOHN W. ANDERSON,

"by his solicitor, JOHN M. B. LOVELL."

"In Chatham Superior Court, ex parte John W. Anderson et al.

"On reading and filing the petition in the above case, it is ordered, adjudged and decreed, that the said John W. Anderson, Francis S. Bartow and Charles A. L. Lamar be and they are hereby discharged from their trusteeship, as is prayed for in the aforesaid petition, and that the said John Milledge be and is hereby appointed trustee, under the said trust deed, in their place and stead.

(Signed)

"W. B. FLEMING, J. E. D. Ga.

"Dated Savannah, June 17th, 1857."

2d. An amicable bill, filed in the names of Catharine Milledge, wife of John Milledge, by John C. Snead, as her next friend, and John Milledge, Catharine Milledge, Richard H. Milledge and Gazaway L. Milledge, infants under twenty-one, by the said Snead, as their next friend, against John Milledge, trustee, etc., with the answer and decree. The bill stated the trust deed already in evidence; that Mary Milledge was dead, intestate, and without having appointed any one to take a conveyance of the property, as provided by the deed; that the minor complainants were the only children of the complainant,

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Catharine, and her husband, John Milledge, living at the death of the said Mary; that the trustees had sold some of the property and paid the mortgage to Anderson and the \$3,000 00 mentioned in the deed, but had made no further sales; that they had afterwards resigned the trust, and John Milledge, the husband of the complainant, Catharine, had been appointed in their stead by the order of the Court; that there was due on the property \$1,000 00 to Lamar, and \$600 00 to one Wyllly, for which he had a lien, left unpaid by the resigned trustees; that it was necessary to provide for the education of the two eldest children, but they were without means to procure it, unless means could be raised by a mortgage of the unsold property remaining in the hands of John Milledge, the trustee; that the deed gave power to the trustees and their successors to sell and mortgage the property or any part of it, and that the complainants had applied to John Milledge, as successor in the trust, to mortgage the property to raise \$4,100 00 to pay off the above mentioned incumbrances, and to educate the complainants, but that John Milledge refused to do so, for want of authority, etc.; that all parties in interest were represented and consenting, and there was no question of fact in dispute. The bill then prayed for a decree to require Milledge, as trustee, to raise \$4,100 00 by the proposed mortgage, etc. Appended to the bill was this authority to the solicitors:

"We authorize Messrs. Lloyd & Owens to file this bill, and use our names as complainants and *prochein ami*.

(Signed)

"JOHN C. SNEAD,

For Mrs. Catharine Milledge, and the infants, complainants, John, Catharine, Richard H. and Gazaway L., named in the foregoing bill.

(Signed)

"June 20, 1857."

"CATHARINE MILLEDGE.

John Milledge, the defendant, acknowledged service June 20, 1857, and on the same day, before a Notary of Chatham county, swore to his answer, which admitted the facts stated

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in the bill, and was filed June 22, 1857. On the same day the answer was filed, the decree was rendered, reciting that "this cause came on to be heard before me at Chambers upon bill, answer and exhibits, all parties in interest being represented and consenting, and no question of fact being in dispute," and proceeding to give the authority to mortgage prayed for.

3d. A mortgage given by John Milledge, as trustee, in pursuance of the above decree, to Joseph Burke, dated June 22, 1857, including the land sued for.

4th. The record of foreclosure proceedings upon said mortgage. Rule absolute rendered in May, 1858.

5th. The execution in pursuance of the foreclosure, with the sheriff's entries of the levy and sale.

6th. The deed from Waring Russell, sheriff, etc., in pursuance of the sale, to Joseph Bryan, dated March 4, 1859, and including the land sued for.

7th. The will of the said Joseph Bryan, dated August 5, 1859, whereby he gave all his property to his wife, Jane, the defendant in this suit.

It was admitted by the plaintiff that at the time of the sheriff's sale to Bryan, Milledge was exercising authority and ownership over the land as trustee; and by the defendant, that at the time of the filing of the amicable bill, all the parties to it resided in Richmond county.

The jury returned a verdict for the defendant. The plaintiff moved for a new trial, upon the following grounds, to-wit:

1st. Because the Court did not charge, as requested by the plaintiff, that the trust created by the trust deed from Mary Milledge to John W. Anderson and others, became executed upon the death of Mary Milledge; and that the said plaintiff then became the absolute owner, at law as well as in equity, of an undivided fifth of the property, the office of the trustee then ceasing as to him.

2d. Because the Court did not charge, as requested by the plaintiff, that the order appointing John Milledge trustee

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under the said trust deed did not make him trustee for the plaintiff.

3d. Because the Court did not charge, as requested by the plaintiff, that the said order was void as to him, because he was not a party to the petition on which it was granted.

4th. Because the Court did not charge, as requested by the plaintiff, that the said order was void as to him, because he did not consent thereto, he being then an infant and incapable of such consent.

5th. Because the Court did not charge, as requested by the plaintiff, that the said order was void, because all parties in interest were not represented and consenting, the Court being without jurisdiction, even in term time, to make such an order in an *ex parte* proceeding, except where all parties in interest were represented and consenting, and there was no question of fact in dispute.

6th. Because the Court did not charge, as requested by the plaintiff, that the said order was fundamental to the decree afterwards granted; and the order being void, the decree was also void, at least as to the said plaintiff.

7th. Because the Court did not charge, as requested by the plaintiff, that the decree granted at Chambers was void, because the Judge, at Chambers, had no authority to grant such a decree, except with the consent of all parties in interest; it being apparent on the face of the bill that the plaintiff was an infant, and was not consenting because he could not consent.

8th. Because the Court did not charge, as requested by the plaintiff, that the decree was void, because the Judge, at Chambers, had no authority to order a sale or mortgage of trust property for any purpose not involving the preservation or reinvestment of the trust fund.

9th. Because the Court charged substantially to the contrary of each of the above propositions.

The motion was overruled, and a new trial refused. To this decision the defendant excepted upon each of the grounds aforesaid.

JACKSON, LAWTON & BASSINGER; B. H. HILL & SON; CHARLES N. WEST, for plaintiffs in error, submitted the following brief:

1st. Under the trust deed, Mrs. Catharine Milledge and her four children, who were living at the time of Mary Milledge's death (of whom the plaintiff was one) were tenants in common of the property then remaining: 29 Ga., 403; 43 *Ibid.*, 327. And the trust became at that time executed: 7 Ga., 517; 23 *Ibid.*, 484; 32 *Ibid.*, 264.

2d. Before entering upon a discussion of the validity of the proceedings by means of which the plaintiff's lessor was deprived of his property, the attention of the Court is asked to the haste with which they were conducted and some of the circumstances disclosed by the proceedings themselves. These indicate a degree of indifference and carelessness on the part of those who assumed to represent the minors interested, which, if not equivalent to fraud, demand of the Court the closest scrutiny into all that was done.

3d. The effect of the order appointing John Milledge trustee was not to make him trustee for the plaintiff's lessor: 43 Ga., 327.

4th. The order was void as to the plaintiff, because he was not a party to the petition or represented therein: 25 Ga., 558; 27 *Ibid.*, 560; 30 *Ibid.*, 696; 1 Bailey's Equity Reports, 395; Hill on Trustees, 195. And the Court had no jurisdiction to make such an order in an *ex parte* proceeding, unless all parties in interest were represented and consenting: 3 Dan. Ch. Pr., 1801, 2076, 2094; R. M. Charlton, 109; 15 Ga., 319; Hill on Trustees, 194. See, also, Hill vs. Printup, decided in this Court, during its term commencing in January, 1873.

5th. If this order was void, the subsequent decree, which was in fact based upon it, must have been void also. For though persons *sui juris*, not bound by such an order, might possibly be held to accept the appointment as valid by filing a bill in pursuance of it, no such adoption or ratification can

be predicted of a minor, or result from the use of his name by a *prochein ami*.

6th. But there are objections to the decree at Chambers, irrespective of the invalidity of the order. The authority of the Chancellor to make it, if he had any, is to be sought in the Act of 1854: Acts 1853-4, pam., 59. This statute gave authority to make such a decree only "where all parties in interest were represented and consenting," etc. And it was apparent on the face of the bill that four of the parties in interest were minors, and could not consent; 4 Cranch C. C., 499. The consent required by the statute was not an implied, presumed, or inferential consent, but an express consent.

7th. The decree was void, because granted for a purpose not within the statute, which gave no authority to order a sale or mortgage of trust property in Chambers, except for division or reinvestment.

8th. In support of the last two positions we invoke not only the rule that statutory remedies must be exactly pursued, and the other rule that a statute authorizing proceedings by which a party may be deprived of his property must be strictly construed, but also the example of the English Court of Chancery when acting under statutes providing special proceedings: 2 English Law and Equity, 40; 11 *Ibid.*, 39-40; 13 *Ibid.*, 375; 19 *Ibid.*, 319; 1 Mylne & Keene, 677; 3 Dan. Ch. Pr., 2094.

THOMAS E. LLOYD; HARTRIDGE & CHISHOLM, for defendants, argued as follows:

1st. The property in dispute was conveyed by Mary Milledge to Anderson, Bartow and Lamar, and their *successors*. All the powers of the original trustees were given also to the *successors*.

2d. The powers in that deed were to grant, bargain, sell, lease, mortgage, or otherwise dispose of said lots in whole or in part, and in such manner or upon such terms as the said trustees may seem meet and proper: *first*, to pay incum-

brances; second, to pay \$3,000 to Catharine Milledge; and third, to reinvest.

3d. And these powers vested in John Milledge as soon as he became the successor of Anderson, Bartow and Lamar.

4th. Did John Milledge become such successor?

(a.) On the 17th June, 1857, Anderson, Bartow and Lamar resigned; they could, by the terms of the deed, do this act: Adams' Eq., (marg. p.) 38, 36; Lewin on Trusts, 24 Law Lib., (marg. p.) 465.

(b.) By the resignation, the estate being unrepresented, was in charge of Chancellor, and he could appoint trustees on his own motion: Willard's Eq., 610; Jeremy's Eq., 173, (n;) Adams' Eq., (marg. p.) 36; 5th Paige, 46.

(c.) The appointment in Georgia could be made on petition: 15th Ga. (See order and petition, June 17th, 1857.)

5th. As a conclusion from the foregoing propositions, John Milledge had full power to make the mortgage, etc., and the purchaser, at a judicial sale, was not bound to look to the application of the proceeds: 7th John. Chan., 150; 1 Kelly, 324; Code, sec. 2586.

6th. But it may be argued that John Milledge was not only improperly appointed, but that admitting the legality of the appointment, the trust deed conferred no power to mortgage the property for *educational purposes*. If such objection be tenable, they are all overcome by the bill, answer and decree of 22d June, 1857.

(a.) The plaintiff in this case was a complainant in that bill, and though an infant, was properly represented by John C. Sneed, *prochein ami*: McPherson on Infants, 41 Law Lib., (marg.) 363; Cooper's Eq., 27.

(b.) The father was the person from whom he was demanding a right to an education, and could not act, and the bill could be filed by any one: *Ibid.*

(c.) The Court does not appoint the *prochein ami* of infant complainant: Font. Eq., 474, note; Reeves' Domestic Rel., 318; Cooper's Eq., 27.

(d.) The Court of equity has never scrupled to break the

principal for *education*: McPherson on Infants, 41 Law Lib., (marg. p.) 253; Font. Eq., 473; 4th John. Chan., 103.

(c.) In this bill, answer and decree, there was then an equitable cause, with parties properly represented, and the decree based on the same is good: 41 Law Lib., (marg.) 386; 3 Atk., 626; 2 P. W., 519; 1 Atk., 631; 26 Ga., 547; 2 School & Lefroy, 577.

7th. If, then, the plaintiff, Gazaway Milledge, in the case at bar, was a complainant properly before the Court in the said bill, answer and decree of June 22d, 1857, all the admissions in the bill are evidence against him now and also estoppel: 44 N. Y., 158; 12 Ga., 52; 32 *Ibid.*, 565; Code, sections 3731, 3734, 3700.

(a.) Those admissions are: 1st. That the trust estate was in debt to Wylly and Lamar, in the nature of liens. 2d. That it was necessary to raise money for education. 3d. That John Milledge was the *trustee*: See bill of June, 22d, 1857.

(b.) If John Milledge had never been trustee before, that decree authorizing him to act in this particular instance, is good against complainant and all acts under it.

TRIPPE, Judge.

1. The question in this case which determines it and settles the other issues presented is, whether the children of Mrs. Catharine Milledge, at the death of Mary Milledge, the grantor, took an equitable or a legal estate in the property mentioned in the deed. Did the trust continue as to them, or was it determined? Or, in the language generally used in the authorities, was the trust executed at the death of the grantor? If the trust became an executed or determined trust at that time, as to the children, their interest or right, which then first accrued, or rather vested in them, was a legal interest, and constituted in them a legal estate, subject to those rules of law, and those only, which govern legal estates. We think it is clear, from the instrument creating the estate, that on the death of Mary Milledge, intestate, and without having exercised her power of appointment,

the children were let into an immediate right to a share of the property, and that the exclusive right of the grantor, or of Catharine Milledge, to have the income paid to the order of either, was then ended. It could not, of course, have been paid to any order of the grantor after her death, and had it been intended that Catharine Milledge should continue for life to possess that right solely in herself, it would have been so expressed; or, at least, a contrary provision would not have been immediately added. That provision is, that after the contingency of intestacy and non-appointment during life, the property should be held "for the said Catharine Milledge, wife of the said John, and for the children of the said John and his said wife, living at the death of the party of the first part," the grantor.

In *Jackson vs. Coggin*, 29 *Georgia*, 403, property was given "to Mary Scott and her children, free from the disposition of any future husband." It was held in a suit by one of the children against the executors of the will and the mother, that "the mother took as a joint tenant with her children," and a recovery was had by the child suing. There is nothing in the terms of this instrument, or in any rule of construction, that suspends the interests of the children to the death of Catharine Milledge.

Was this interest of the children a legal interest or estate? In the case just cited it was recognized as a legal right in the children, although the interest in the mother was the subject matter of a trust. In *Jordan vs. Thornton*, 7 *Georgia*, 517, the bequest was to a trustee for the use of the mother for life, and at her death, to the use of her children. It was held that at the death of the mother, the children were the absolute owners of the property and could recover in their own right. The point was made that it was a continuing trust, under the terms of the will. But it was adjudged to be an *executed trust*. In *Pope and wife vs. Tucker*, 23 *Georgia*, 76, the decision was, that a gift to a father in trust for his children is *not* an executory, but an *executed trust*, and that the children *took* a vested legal interest, and were entitled to recover in

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their own right. So in *Bowman vs. Long*, 26 Georgia, 142, where the bequest was to a trustee for the use of an infant grandson. The grandson had a guardian, and it was held that the child took both the legal and equitable estate, and that the guardian was entitled to the possession of the *corpus*, and further, that "the attempt to vest the title in a trustee was a failure." Again, in *Walker vs. Watson*, 32 Georgia, 264, the conveyance was to a trustee for the use of an orphan minor, who had a guardian. The decision was, that the guardian was entitled to the possession of the property as against the trustee, the trust being *executed* and the possession following the use. The case of *Loyless vs. Blackshear et al.*, 43 Georgia, 327, is more like the one under consideration, in the terms used in the conveyance specifying the beneficiaries, etc. That was a deed conveying certain lands to the husband as trustee for his wife and children. It was held that the mother and her children then in life, took an estate as tenants in common, in fee simple, and that the children were entitled to a partition, in a proceeding in their own right, of the lands thus conveyed.

These decisions, which are in accordance with all the authorities since the statute of uses, fully settle, we think, that the children of Mrs. Catharine Milledge took, at the death of Mary Milledge, an estate, as tenants in common with their mother, in the property remaining at the grantor's death, and that it was a legal estate in them, unaffected by any trust, the trust, except as to their mother's interest, being determined by the death of the grantor. The statute of uses declares, that "when any person shall be seized of lands to the use, confidence or trust of another person," that person shall "stand and be seized or possessed of the land, of and in like estates as they have in the use, trust or confidence, and that the estate of the person so seized to uses shall be declared to be in him or them that have the use in such quality, manner, form and condition as they had before in the use:" 2 Bl. Com., 333.

2. The deed was executed by Mary Milledge, and the orders were passed by the Judge, in Chambers, several years before

the Code went into operation. The only authority that could be claimed for the power exercised by the Judge was the Act of 20th February, 1854. Prior to that Act, it was held, in *Arrington vs. Cherry*, 10 *Georgia*, 429, that a Judge, at Chambers, had no power to order the sale of trust property; that chancery jurisdiction was conferred upon the *Superior Courts* and not upon the *Judges* thereof. It was never claimed in any case that the Judge, at Chambers, had power to order the sale of the legal estate of minors, or of any other person. There was another mode specially pointed out by law to effect the sale of the property of minor children, or of other wards, such as lunatics, etc. The general rule was by an application to the Court of Ordinary. Whenever jurisdiction was exercised by a Chancery Court for that purpose before the Act of 1854, it was upon a *regular proceeding in equity*, and upon special cause shown. The Act of 1854, giving power to a Judge in Chambers to appoint and remove trustees, and to order the sale of property under certain conditions, applied only to cases of trust estates; such estates as should be in the hands of trustees, and perhaps to such property or assets as might be within equity jurisdiction by reason of some pending litigation in her Courts. In the case under consideration, where the estate in the children of Mrs. Catharine Milledge was a legal estate, there was no place for a trustee to fill, so far as they were concerned—no power to appoint to such an office, and of legal necessity—no authority to invest such a person with the right and control over the whole property. All the proceedings as to the appointment of the successor to the former trustees who resigned, and as to the order empowering the successor to incumber by mortgage the whole property, were founded on the assumption that the trust continued for the whole, the children as well as the mother. This not being true, to the extent of the children's interest, such proceedings were without authority of law.

Judgment reversed.

Bradley vs. Johnson.

EMMA BRADLEY, plaintiff in error, vs. JOHN JOHNSON, administrator, defendant in error.

1. The judgment of a Court of concurrent jurisdiction, *directly upon the point*, is, as a plea, a bar, or as evidence, conclusive between the same parties, upon the same matter, directly in question in another Court. The judgment of a Court of exclusive jurisdiction, directly upon the point, is in like manner conclusive upon the same matter, between the same parties, coming incidentally in question in another Court for a different purpose.
2. The complainant having *caveated* the application of the defendant for administration upon the estate of his intestate upon the ground that she was entitled to such administration, as his widow, and the jury in the Superior Court having, on appeal, found a verdict on this issue in favor of the defendant, and a judgment having been rendered accordingly, such judgment is not a bar to a bill filed by the complainant as the widow and heir-at-law of said intestate, against the defendant for an account and distribution of the estate.
3. Estoppels must be mutual.

Judgments. Estoppel. Before Judge JOHNSON. Muscogee Superior Court. October Term, 1872.

For the facts of this case, see the decision.

HENRY L. BENNING ; G. E. THOMAS, for plaintiff in error.

PEABODY & BRANNON, for defendant.

WARNER, Chief Justice.

This was a bill filed by the complainant as the widow and heir-at-law of Bradley against the defendant, as the administrator of Bradley, for an account and distribution of Bradley's estate, with a prayer for an injunction. The defendant denies that the complainant is the widow and heir-at-law of Bradley. On the trial of the case the defendant offered and read in evidence an exemplification of the record from the Court of Ordinary of Muscogoe county, in which it appears that Johnson made application to that Court for letters of administration on Bradley's estate, to which the complainant

entered a *caveat*, claiming that she was entitled to the administration as the widow of Bradley. The Ordinary granted the administration to her. Johnson entered an appeal to the Superior Court from the decision of the Ordinary, and on the trial of the appeal the jury found the following verdict: "We, the jury, find that John Johnson, applicant, is entitled to administration on the estate of Thaddeus W. Bradley, deceased." Judgment was entered on this verdict, in exact accordance with the terms thereof, and certified to the Ordinary, and made the judgment of that Court, and Johnson was appointed by the Ordinary administrator on Bradley's estate. The Court charged the jury, "that if the question whether the plaintiff was the widow of deceased was made and adjudicated between the parties to this cause in the proceedings had before the Ordinary and on appeal, and it was therein and thereby adjudged that the plaintiff was not the widow of deceased, such adjudication was conclusive of the fact in this case, and she would be thereby barred of her right to maintain her present suit." To which charge of the Court the complainant excepted, and the question is, whether the judgment of the Court of Ordinary granting the letters of administration on the estate of Bradley to Johnson, as the same appears in the record, was conclusive evidence that the complainant was not the widow of Bradley, so as to conclude her from showing that she was his widow on the trial of the equity cause, and was a bar of her right to maintain that suit.

1. The rule as to the conclusiveness of judgments, as stated by Lord Chief Justice DeGrey, in the *Duchess of Kingstone's* case (20 Howell's State trials, cited by Professor Greenleaf, volume 1, section 528) is, that the judgment of a Court of concurrent jurisdiction, *directly upon the point*, is, as a plea, a bar, or as evidence, conclusive between the same parties, upon the same matter, directly in question in another Court; that the judgment of a Court of exclusive jurisdiction, *directly upon the point*, is in like manner conclusive upon the same matter, between the same parties, coming incidentally in question in another Court, for a different purpose.

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2. The judgment of the Court of Ordinary offered in evidence in this case, is the judgment of a Court of exclusive jurisdiction as to the granting letters of administration on intestate's estates; that judgment was conclusive as to the fact that letters of administration had been granted to Johnson on Bradley's estate when offered in evidence on the trial of the equity cause, but it was not conclusive on that trial upon the point as to whether the complainant was the widow of Bradley; the judgment does not decide anything more, and does not purport to decide anything more than the fact that Johnson was entitled to the administration on Bradley's estate. That judgment is not an adjudication directly upon the point that the complainant is not the widow of Bradley, and does not purport to decide that question. Moreover, it does not affirmatively appear from the verdict and judgment thereon that the fact of her being the widow of Bradley was the only question made and decided by the judgment of the Court of Ordinary; that it was one of the questions decided, is inferred by argument from the judgment and proceedings in the Court of Ordinary; the judgment itself is not directly upon that point, and unless the judgment of the Court of Ordinary was rendered directly upon that point as shown by the record, the complainant was not estopped by that judgment from proving that she was the widow of Bradley on the trial of the equity cause.

3. Besides, estoppels should be mutual. If administration had been granted on Bradley's estate to the complainant instead of Johnson, would the judgment of the Court of Ordinary, granting administration to her, have estopped the heirs of Bradley on a bill filed by them against her for distribution, from showing that she was not his widow? We think not. In our judgment the charge of the Court was error, because it did not appear from the judgment rendered by the Court of Ordinary that the question whether the complainant was the widow of Bradley was necessarily decided by that Court, inasmuch as that judgment does not appear to have been rendered *directly upon that point*, and it was error to

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assume that it was so rendered: *Hunter vs. Davis*, 19 *Georgia Reports*, 413.

Let the judgment of the Court below be reversed.

THE SOUTHERN EXPRESS COMPANY, plaintiff in error, *vs.*
MARTIN CONNOR, defendant in error.

1. Where an action was instituted in the name of a plaintiff who was adjudicated a bankrupt pending the suit, and the trustee selected by the creditors, with knowledge of such suit, did not have himself made a party, but consented that the suit proceed in the name of the original plaintiff, and no exception was made to the Court's allowing the case so to proceed, but the defendant excepted to the refusal of the Court to charge the jury that if they gave a verdict for the plaintiff, they should find for him for the use of the trustee:

Held, That it was not error in the Court to refuse so to charge.

2. The right of the trustee, if he has any, to the money when paid, or of the defendants, to be protected in paying it to the proper party, may be secured by proper steps being taken for that purpose.

Bankrupt. Parties. Pleading. Before Judge JOHNSON.
Muscogee Superior Court. October Term, 1872.

Connor brought suit against the Southern Express Company for \$1,500 00 damages, alleged to have been sustained on account of the negligent loss of goods by the defendant, which it had contracted to transport from the city of Savannah, in the State of Georgia, to the city of Columbus, in said State.

The defendant pleaded in abatement, that since the commencement of said suit, to-wit: on December 26th, 1868, the said plaintiff, for himself, and as a member of the firm of M. Connor & Company, filed his petition in bankruptcy in the United States District Court for the Southern District of Georgia, and in his schedule of assets was embraced the suit aforesaid; that under said proceedings in bankruptcy, Gabriel Zeigler was appointed trustee by order of the Bankrupt Court, and on April 16th, 1869, all the right, title and interest

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of said plaintiff in the suit was conveyed to said trustee for the benefit of the individual creditors of the plaintiff, as well as of the creditors of the aforesaid firm of M. Connor & Company; that said suit is being now prosecuted by the plaintiff against the consent of said trustee, for his individual benefit, in violation of said trust and in fraud of his creditors.

The defendant filed, also, the general issue. What disposition was made of the plea in abatement, the record fails to disclose, but it is to be inferred that it was stricken on demurrer, leaving the case before the jury on the second plea.

So far as the question of the bankruptcy of the plaintiff is concerned, which is the only point now involved in this case, the evidence shows the facts to be as stated in the plea, with this exception: that the charge that the suit was proceeding in the name of the plaintiff without the consent of the trustee, was untrue, for the testimony demonstrated the very reverse to be the fact, to-wit: that the trustee agreed with the plaintiff that he should proceed with the suit for his own benefit, if he would turn over to said trustee a certain note, to which condition the plaintiff assented.

The defendant requested the Court to charge the jury as follows: "If they find for the plaintiff, to render their verdict for the use of Gabriel Zeigler, trustee, if the evidence shows that said Gabriel Zeigler was appointed trustee, and this claim was among the assets transferred to him, and it does not appear that a transfer to the plaintiff has been made with the consent of the committee appointed under the proceedings in bankruptcy."

The Court refused so to charge, and the defendant excepted.

The jury found for the plaintiff \$1,076 52.

The defendant assigns error upon the aforesaid ground of exception.

R. J. MOSES, for plaintiff in error.

HENRY L. BENNING; PEABODY & BRANNON; JOSEPH F. POU, for defendant.

TRIPPE, Judge.

The trustee selected by the creditors was aware of the pendency of the suit in the name of the bankrupt, and consented that it should proceed in the name of the original plaintiff. No exception was taken to the Court's allowing the case to be tried as it was instituted. The objection is that the Judge refused to charge the jury that if they rendered a verdict against the defendant, it should be for the use of the trustee. Beside the anomaly of a verdict being for one, or for his use, who is not a party of record, we do not think the verdict, as it stands, can endanger the rights of the plaintiff in error. If the trustee be the only person to whom the money can be legally paid, then a payment to him would be a discharge of the debt. In any event, the defendant in the judgment, or the trustee, can have whatever rights either may have fully protected by taking the proper steps for that purpose. There need be no danger of paying the debt twice, and that seems to be all that is apprehended.

Judgment affirmed.

CAMPBELL & JONES, plaintiffs in error, vs. BOWEN & BIRD,
defendants in error.

1. If articles are purchased by a partner for the legitimate use and business of the firm, then both partners are liable for the payment therefor, notwithstanding the other partner may have notified the vendors of the articles not to extend credit to his associate on account of the partnership.
2. Suit having been brought against partners jointly, the verdict should have been rendered against both and not against one only.

Partnership. Practice. Verdict. Before Judge ROBINSON. Jones Superior Court. October Adjourned Term, 1872.

For the facts of this case, see the decision.

Campbell & Jones vs. Bowen & Bird.

ROBERT A NISBET, by brief, for plaintiffs in error.

BLOUNT & HARDEMAN, for defendants.

WARNER, Chief Justice.

1. This was an action brought by the plaintiffs against the defendants as partners engaged in cultivating a plantation for the year 1870, on an account for \$668 81. On the trial of the case, the jury found a verdict against the defendant Bowen for the sum of \$326 31. The plaintiffs made a motion for a new trial, on the ground that the verdict was contrary to the charge of the Court, contrary to law, contrary to the evidence, and without evidence to support it, which was overruled, and the plaintiffs excepted. It appears from the evidence in the record, that the articles mentioned in the account were sold by the plaintiffs to the firm of Bowen & Bird, mainly on the credit of Bowen. It also appears, that in the early part of October, 1870, before the termination of the partnership, either by a dissolution thereof, or by the expiration of the time for which it was limited, Bowen, one of the partners, notified the plaintiffs not to give Bird, the other partner, credit any longer on his account, and that part of the account sued for was for articles purchased by Bird from the plaintiffs after said notice. If the articles purchased by Bird, the other partner, were purchased by him for the legitimate use and business of the partnership, and for the benefit thereof, then, in our judgment, both partners were liable for the payment of them, notwithstanding the notice of Bowen, the other partner.

2. In any event, the suit having been brought against the partners jointly, the verdict should have been rendered against both, and not against one only.

Let the judgment of the Court below be reversed.

R. P. S. KIMBROW, plaintiff in error, vs. THE BANK OF FULTON, defendant in error.

1. The Act of 13th October, 1870, requiring proof of the payment of taxes on contracts made prior to June 1st, 1865, is unconstitutional and void.
2. The general rule is, that statutes of limitation do not apply to bank bills, because they are by the consent of mankind and course of business, considered as money, and that their date is no evidence of the time when they were issued, as they are being continually returned to and reissued by the bank. But if the bills have ceased to circulate as currency, and have ceased to be taken in and reissued by the banks, they no longer have that distinctive character from other contracts, which exempts them from the operation of the statute of limitation.
3. If the bills of the Bank of Fulton had thus lost this distinctive character prior to the first of June, 1865, they come within the provisions of the Act of 16th March, 1869, entitled "an Act in relation to the statutes of limitation and for other purposes."
4. It is necessary in a plea of the statute of limitations by a bank when sued on its bills, to aver the facts which take them out of the ordinary rule, to-wit: that the statute does not apply to such contracts.
5. When a defendant sets up by plea that the contract is void under the Constitution, because it was made for the purpose of aiding and encourage "*the late rebellion*," it is necessary that the facts should be stated in such plea, going to show how and in what way the contract was intended to give such aid and encouragement.
6. When amongst other defenses, such pleas have been filed and stricken by the Court on demurrer, and such decision excepted to and exception certified and entered on the minutes, it is competent for the defendant to amend the pleas on a new trial, which has been granted to the plaintiff.

Relief Act of 1870. Statute of limitations. Bank bills. Pleadings. Amendment. Constitutional law. Before Judge HOPKINS. Fulton Superior Court. October Adjourned Term, 1872.

On May 31st, 1871, Kimbro brought suit in the Justice's Court of the one thousand two hundred and thirty-fourth district, against the Bank of Fulton, on four bills of said bank, dated September 20th, 1868, two for \$20 00, one for \$50 00, and one for \$10 00. Judgment was rendered in favor of the plaintiff, and the case was carried, at the instance of the defendant, to the appeal docket of the Superior Court.

The defendant pleaded as follows:

1st. That it never had transacted business in the one thousand two hundred and thirty-fourth district, but on the contrary, had always, and was then transacting its business in the one thousand two hundred and twenty-sixth district.

2d. The general issue.

3d. "That the obligations or evidences of indebtedness upon which said suit is predicated, or some part thereof, were made and not executed during the late rebellion, and said defendant has reason to believe, were given and used with the intention of aiding and encouraging said rebellion, and that it was the purpose and intention of all the parties to such contract to aid or encourage such rebellion, and that fact was known to the other party, and that, therefore, said obligations or evidences of indebtedness are, under the provisions of the Constitution of the State of Georgia, null and void," etc.

4th. The statute of limitations of March 16th, 1869. This plea merely set forth said Act, without alleging any special circumstances which brought plaintiff's claim within its operation.

The issue formed upon the first plea was submitted to the jury, and a verdict rendered in favor of the plaintiff. No exception was taken to any ruling upon this collateral issue.

A demurrer was filed to the third and fourth pleas which was sustained by the Court, and the defendant excepted.

Upon the trial of the issue formed by the second plea, the Court charged the jury that "it must be made to appear to them that all legal taxes chargeable by law upon the notes sued on, have been paid since their date."

The jury returned a verdict for the defendant. The plaintiff excepted to said charge and assigns error thereon. The defendant assigns error upon the exception to the ruling on the demurrer to the third and fourth pleas.

JACKSON & CLARKE, for plaintiff in error.

COLLIER, MYNATT & COLLIER; B. H. HILL & SON, for defendant.

TRIPPE, Judge.

1. The charge of the Court below, under the ruling of a majority of this Court, prior to the decision of the Supreme Court of the United States, in *Walker vs. Whitehead*, was, that it must be made to appear to the jury, on the trial of cases founded on contracts made prior to June 1st, 1865, that all legal taxes due on the contract have been paid. This charge was error, as this Court during the last and present term has held in several cases.

2. The authorities are numerous, and almost without conflict, that the statute of limitations does not apply to bank bills, and it was so decided in the case of *Dougherty vs. The Western Bank of Georgia*, 13 *Georgia Reports*, 288, and again recognized as the correct principle in 30 *Georgia*, 770. The reason given for such exception of bank bills from the common rule, is, that they are by the consent of mankind and course of business considered as money; that their date is no evidence of the time when they were issued, as they are being continually returned to and reissued by the bank. Under such a state of facts, it would be impossible to fix a starting point for the statute to begin to run. (See 13 *Georgia*, *supra*, and the numerous authorities cited.) But if such bills have ceased to circulate as currency, and have ceased to be taken in and reissued by the bank, and to be considered as money in the ordinary sense of that term, the reason for such exception ceases. They no longer have that distinctive character from other contracts, which excepts them from the operation of the statute of limitations. (See remarks of LUMPKIN, Judge, 30 *Georgia*, 774.) These facts would not constitute the date of the bills as the period at which the statute would commence, for as was said in *Greer vs. Perkins*, 5 *Humphries*, 592, 'the date of a bank note affords no presumption that it was put in circulation at that time. It may have been filled up and dated long before it was issued, and may have often been returned and reissued at long and distant intervals.

3. It does not appear from the record whether the bank

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bills sued on in this case had lost this distinctive character; and if so, at what time. If it were prior to June 1st, 1865, they then stood on the same footing as other contracts, and come within the provisions of the Act of March 16th, 1869, entitled "An Act in relation to the statute of limitations," etc. If this change in their character did not occur until after said 1st day of June, 1865, we do not pronounce what effect the 8th section of the Act of March, 1869, would have upon them. Since this case was argued and determined, two other cases have been pronounced on at the same term, touching this point, in the case of contracts maturing after June 1st, 1865, and of those made after that day, but before the date of the passage of the Act. (See *Addison vs. Christy*, and *Black et al., vs. Swanson*, July term, 1873, not yet reported.)

4. The rule as to pleading, in relation to the statute of limitations, should be the same, both as to plaintiff and defendant. That is, as it is necessary for the plaintiff, if he declare on a contract which, on its face, would be barred by the statute to allege the facts, if any, which would take the case out of the statute, or be liable to dismissal of his suit on demurrer, so should a bank, when sued on its bills, which are not, under the general rule, within the statute, show, by its plea, if it rely on the statute, such facts as will bring the bills within its operation, or the plea can be demurred to.

5. The same principle applies to a plea that the contract is void under the Constitution, in that it was made for the purpose of aiding and encouraging "*the late rebellion*." That principle is, that the plea "*shall plainly, fully and distinctly set forth the defense*." A plea simply stating generally that the contract was made to *aid and encourage the rebellion*, is not sufficient. It should set forth the facts going to show how and in what way the contract did, or was intended to, give such aid and encouragement. More especially should a defendant filing such a plea be held to this rule, when the plea casts the *onus* on the plaintiff of disproving the plea.

6. The Court below was right in sustaining the objection

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to the pleas of the defendant as to the statute of limitation and the illegality of the contract. As we have been asked to pass upon the question whether, upon a new trial, the defendant has the right to file full and proper pleas on these points, we say, that as they were adjudged defective for not being full enough, or as that is the ground upon which the judgment of the Court is sustained, we see no reason why the defendant should not have the right to amend.

The judgment of the Court below is reversed, and a new trial ordered on the first point mentioned.

WILLIAM JOHNSON, plaintiff in error, vs. JAMES M. GRAY, executor, defendant in error.

Where a Confederate contract was the subject of investigation before the jury, it was error in the Court to refuse to allow the plaintiff to prove the price of corn and other articles at the date of such contract, as it would have tended to have shown the value and purchasing power of Confederate money at that time, so as to have enabled the jury to adjust the rights of the parties, under the provisions of the Ordinance of 1865, on principles of equity.

Scaling Ordinance. Evidence. Before Judge ROBINSON. Jones Superior Court. October Adjourned Term, 1872.

For the facts of this case, see the decision.

W. A. LOFTON ; C. L. BARTLETT, for plaintiff in error.

BLOUNT & HARDEMAN, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendant on a promissory note for \$10,869 18, dated 14th December, 1863, due 1st of December, 1864, with interest from the 2d of December last. On the trial of the case, the jury found a verdict for the plaintiff for the sum of \$339 21 in

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gold, without interest or costs. The plaintiff made a motion for a new trial, on the ground that the verdict was contrary to the charge of the Court, contrary to law and the evidence, and for error in admitting and rejecting evidence at the trial. The Court granted the motion, and the defendant excepted.

This was a Confederate contract, the note having been given for a tract of land purchased by the defendant at executor's sale. One of the main questions on the trial was as to the value of the land purchased, in good money, and what was the value or purchasing power of Confederate money at the date of the note, or at the time the same became due. We think the Court erred in refusing to allow the plaintiff to prove the price of corn and other articles of produce at the time of the sale of the land, as it would have tended to show the value and purchasing power of Confederate money at that time, so as to have enabled the jury to adjust the rights of the parties, under the provisions of the Ordinance of 1865, on principles of equity, as provided by law. In view of the rulings of the Court, and the verdict of the jury in this case, we find no error in granting the new trial.

Let the judgment of the Court below be affirmed.

WILLIAM A. BLACK, plaintiff in error, *vs.* **THOMAS R. SWANSON**, defendant in error.

A note executed in January, 1865, and due in December of the same year, was not on the 16th of June, 1871, barred by the statute of limitations, nor was the holder thereof prevented at that time, by the Act of March 16th, 1869, from pleading the same as a set-off to an action pending against him by the maker.

Statute of limitations. Before Judge CLARK. Sumter Superior Court. October Adjourned Term, 1873.

Swanson sued Black in the Justice Court of the seven hundred and eighty-ninth district, on a note which it is impossible to set forth, as the record fails to disclose a copy. The

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case was carried by appeal to the Superior Court, Henry S. Davis becoming the security for Black, the appellant. The defendant pleaded as set-off a note made by Swanson on January 2d, 1865, due December 25th thereafter, payable to the defendant or bearer, for \$400 00. This plea was filed on June 8th, 1871.

The plaintiff introduced the note sued on and closed. The defendant introduced the note pleaded as set-off and closed. The Court charged the jury, "that the note pleaded and introduced as a set-off was barred by the statute of limitations." To which charge the defendant excepted.

The jury returned a verdict for the plaintiff. The defendant assigns error on the aforesaid ground of exception.

ALLEN FORT, by N. A. SMITH, for plaintiff in error.

HAWKINS, GUERRY & HOLLIS, for defendant.

TRIPPE, Judge.

It cannot be denied that there is great difficulty, if indeed there be not an impossibility in construing the Act of March 16th, 1869, entitled "An Act in relation to the statute of limitations," etc., so as to make all parts consistent with each other. The 3d section, which is the first one in the Act touching actions on contracts, refers to bonds and other sealed instruments, and also to statutory actions. This section speaks of actions on bonds, etc., "*which accrued* prior to 1st June, 1865, not now barred," and declares that they must be brought by 1st January, 1870. The 4th section refers to actions on promissory notes and other simple contracts in writing, etc., and prescribes that such actions "*which accrued on a contract which was made* prior to 1st June, 1865, must be brought, etc. The next section is in reference to actions against executors, etc., *which accrued* prior to June 1st, 1865. The 6th section embraces all other actions upon contracts, express or implied, etc., but again defines them *as accruing* prior to June 1st, 1865. The last clause of this section seems to be intended to.

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make the Act apply, as to the time when the action shall be brought, to all the instances before specified of contracts, by providing that it "shall take effect in all cases mentioned whether the right of action had *actually accrued* prior to 1st June, 1865, or was then only *inchoate and imperfect*, if the contract or liability was then in existence."

The 7th section refers to actions for *torts*, and throws no light on the point we are considering. The first provision quoted is as to actions on sealed instruments, etc., and only includes those cases where the *action accrued prior to June 1st, 1865*. Then come the cases of actions "on simple contracts, *which accrued on a contract which was made*" prior to said day. Then *actions* against executors, *which accrued* prior to that day. Next, all *other actions* or contracts, express or implied, *which accrued*, etc. And again, a sort of omnibus provision, saying it matters not whether the *right of action had actually accrued* prior to 1st June, 1865, or was then only *inchoate and imperfect*, if the contract or liability was then in existence, the limitations should take effect. Thus far, it would seem that an action on a note executed in January, 1865, and due in the ensuing December, must have been commenced by the 1st January, 1870. The 3d section, and the latter clause of the 6th, are certainly in their words to that effect. Actions on sealed instruments, against executors, etc., and all other actions, mentioned in the first clause of the 6th section, by the terms of the special provisions in reference to them, need not to have been brought by that time, if the action did not accrue prior to June 1st, 1865. It is only by the last clause of the 6th section that the prescribed limitation can be made to apply to them. To add to the difficulty, and making an almost irreconcilable conflict, the 8th section is as follows: "That all cases of the character mentioned in any section of this Act, *which have arisen*, or in which the *right of action or the liability has accrued*, or the contract has been made since the 1st June, 1865, shall be controlled and governed by the *limitation laws*, as set forth in the *Revised Code* of Georgia, adopted by the

Constitution of this State." Clearly, by this section, in the case of the note supposed, which is just the fact with the note under consideration, to-wit, it was made in January, 1865, and due December, 1865—the right of action did not accrue until after June 1st, 1865, though the contract was made prior to that date. No right of action accrued until the maturity of the note, December, 1865. The 8th section expressly says that such cases shall be controlled and governed by the limitation laws of the Code. Those laws give the holder of the note six years from the time the right of action accrued. We solve the whole difficulty, as far as we can, by bringing this case within the 8th section. It requires no construction of words different from their plain, obvious, simple and legal meaning and effect. And though there may be difficulty in reconciling other portions of the Act to this, yet still greater would be the difficulty in attempting to force any other construction of the clear and palpable terms of the 8th section. It is the last section of the Act, except the repealing clause; and, whatever may be the inconsistencies of the other sections, there can be no doubt as to the meaning of the terms used in this.

The note held by plaintiff in error, though made before, was not due until after June 1st, 1865. No right of action accrued until after that date, and by the Act of March 16th, 1869, it is controlled by the limitation laws set forth in the Code. As by those laws, his right of action would not be barred until December, 1871, and as he had pleaded the note in June, 1871, as a set-off to an action brought against him, he is entitled to recover thereon, so far as he is affected by the statute of limitations.

— Judgment reversed.

Carter, Sheats *et al.* vs. Cardwell & Company.

ISAAC W. CARTER, sheriff, plaintiff in error, vs. J. W. CARDWELL & COMPANY, defendants in error.

B. S. SHEATS, executor, *et al.*, plaintiffs in error, vs. J. W. CARDWELL & COMPANY, defendants in error.

1. Where a portion of an execution from the Superior Court, was voluntarily paid to the sheriff by the defendant, but before the next term of the Court, executions of older date from a Justice Court were placed in his hands to claim the money, and, upon a rule, the fund in the sheriff's hands was applied to the oldest execution, it was error in the Court to make the rule absolute for the full amount of the Superior Court *fi. fa.* It should have been made absolute only for the uncollected balance.
2. The refusal of a rule absolute against the sheriff for the balance due on the Justice Court *fi. fas.*, they having been placed in his hands before levy, and when there was no mandate from the Court to him to make the money on them, but for the purpose of claiming what money might be realized on the Superior Court execution, was not error.

Rule against officer. Sheriff. Execution. Justice Court. Before Judge BUCHANAN. Campbell Superior Court. February Term, 1873.

The only facts necessary to an understanding of these two cases, beyond those stated in the decision, and as far as can be gathered from very confused records, are as follows:

After Carter, sheriff, had levied the Cardwell & Company *fi. fa.*, the defendant paid to him \$100 00. Before any other payment was made, he went out of office. Subsequently, and before the rule *nisi* was issued, he collected the entire balance due on said execution. Six executions in favor of Sheats, executor, *et al.*, issuing from a Justice Court, all of them of older date than the Cardwell & Company *fi. fa.*, were placed in his hands to claim said fund. Upon a money rule, the Court directed the \$100 00 first aforesaid to be paid to the oldest Justice Court *fi. fas.*, and ordered a rule absolute to issue against the sheriff for the entire amount of the Cardwell & Company *fi. fa.*, and refused rule absolutes for the balances still unpaid on the Justice Court *fi. fas.* The Court ignored the payments made to the sheriff after he had gone out of

office. The sheriff excepted to the judgment making the rule absolute against him for the entire amount of the Cardwell & Company *fi. fa.* Sheats, executor, and the other holders of the Justice Court *fi. fas.*, excepted to the decision refusing rule absolutes in their favor, thus ignoring the payments made to the sheriff after his official career had ceased.

Error is assigned upon each of the aforesaid grounds of exception.

WRIGHT & DENT; A. D. FREEMAN; THOMAS W. LATHAM, for plaintiffs in error.

ROBERT J. TUGGLE, by LESTER & THOMSON, for defendants.

WARNER, Chief Justice.

The case of Carter, plaintiff in error, vs. Cardwell & Company, and the case of Sheats *et al.*, plaintiffs in error, vs. Cardwell & Company will be considered together, as both cases are founded on a rule against the sheriff of Campbell county to show cause why he should not pay the amount of Cardwell & Company's execution placed in his hands for collection. Carter, the sheriff, excepts to the judgment of the Court because he was made to pay \$100 00 more than the amount of Cardwell & Company's *fi. fa.*, and the other parties except as to the judgment of the Court disposing of the money. It appears from the record, that in November, 1872, a *fi. fa.* from Campbell Superior Court, in favor of Cardwell & Company against Beck, for the sum of \$325 00 principal, besides interest, was placed in the sheriff's hands for collection. The sheriff made a levy on the defendant's property, who paid him \$100 00, and the sheriff promised to wait with him for the balance due on the *fi. fa.* until Court and not advertise and sell his property. Shortly after the Cardwell & Company *fi. fa.* was placed in the sheriff's hands, several Justice's Court *fi. fas.* of older date were placed in his hands against Beck, with instructions that any money paid by Beck should be applied to them. The Court ordered the \$100 00 which Beck

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had paid to the sheriff, to be applied to the Justice's Court *fi. fas.*, and then made the rule absolute against the sheriff for the full amount of the Cardwell *fi. fa.* In our judgment, this was error. The Cardwell & Company *fi. fa.* was the only one in the sheriff's hands which commanded him to make the money due thereon, and if he failed to make the money, either by the payment thereof by the defendant or by levy and sale of his property, then he was liable to be ruled therefor. If, however, the defendant paid the sheriff part of the money due on the *fi. fa.*, then he was liable to be ruled only for so much as he had failed to collect. In this case he had collected \$100 00, and he was only in default for failing to collect the balance due on the *fi. fa.* Under the notice given him as to the claim of the Justice's Court *fi. fas.*, placed in his hands, it would have been the duty of the sheriff to have held up the money until Court, whether it was voluntarily paid by the defendant or made by the sale of his property, in order to have been protected in the payment thereof by the judgment of the Court. Although the Justice Court *fi. fas.* might have been the oldest, still, if they had been fraudulent or void for any cause, the sheriff would have taken the risk, if he had paid them without the judgment of the Court. The rule against the sheriff should have been made absolute against him only for the amount due thereon, which he failed to collect from the defendant, either by his voluntary payment thereof, or by a levy and sale of his property, and no more. The Justice's Court *fi. fas.* placed in the sheriff's hands had not been levied on the defendant's property, and there was no mandate from the Court to the sheriff to make the money on them. What disposition was to be made of the money when collected by the sheriff on the Cardwell & Company *fi. fa.* was another question. We therefore reverse the judgment of the Court below in the case of Carter, plaintiff in error, vs. Cardwell & Company, and affirm the judgment of the Court below in the case of Sheats *et al.*, plaintiffs in error, vs. Cardwell & Company.

Let the respective judgments be so entered on the record.

SARAH A. ADDISON, administratrix, plaintiff in error, vs.
JOHN CHRISTY & COMPANY, defendants in error.

An account was contracted with a merchant on the 31st of January, 1866. Suit was instituted on the account on the 19th March, 1870. It did not appear in evidence on the trial that, by contract or custom, day of payment was given when the goods were sold :

Held, That under the 8th section of the Act of March 16th, 1869, entitled "an Act in relation to the statute of limitations, and for other purposes," the right of action in this case is controlled and governed by the limitation laws as set forth in the Revised Code of Georgia, adopted by the new Constitution of this State, and said limitation laws requiring suits to be brought within four years on accounts, the right of action was barred when this suit was instituted.

Statute of limitations. Account. Before Judge RICE.
Habersham Superior Court. April Term, 1873.

John Christy & Company brought complaint against John O. Addison on an account dated January 31st, 1866, for \$1,029 61, with a credit of \$475 25, of date February 7th, 1866. The declaration was filed in office on March 19th, 1870. The defendant pleaded the statute of limitations. Pending the litigation, he died, and his administratrix was made a party.

The plaintiffs proved their account and closed. The defendant introduced no testimony, but requested the Court to charge as follows: "That, it appearing from the account sued on that it was contracted more than four years before the commencement of the suit, the same is barred by the statute of limitations of this State."

The Court refused to charge as requested, but charged to the contrary, as follows: "The statute of limitations was suspended at the date of the account sued on, and continued to be suspended until July 21st, 1868, and, therefore, the statute of limitations did not commence to run against the plaintiffs' account until July 21st, 1868, and as there is not four years between July 21st, 1868, and March 19th, 1870, the time of the commencement of the plaintiffs' action, the plaintiffs' action is not barred by the statute of limitations."

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To which charge and refusal to charge the defendant excepted.

The jury returned a verdict for the plaintiffs. The defendant assigns error upon the aforesaid grounds of exception.

C. H. SUTTON, by HILLYER & BROTHER, for plaintiff in error.

GARNETT McMILLAN, by SIDNEY DELL, for defendants.

TRIPPE, Judge.

The 8th section of the Act of March 16th, 1869, is in the following words: "That all cases of the character, mentioned in any section of this Act, which have arisen, or in which the right of action or the liability has accrued, *or the contract has been made since the 1st June, 1865*, shall be controlled and governed by the limitation laws, as set forth in the Revised Code of Georgia, adopted by the new Constitution of this State."

In the case of *W. A. Black et al. vs. T. R. Swanson*, decided at the present term, it was held that, by the plain terms and meaning of this section, a note executed in January, 1865, and due December, 1865, was not barred by the preceding provisions of the Act, on the 1st January, 1870, but the right of action thereon continued until December, 1871, six years from the maturity of the note. Although the 4th section, and the latter part of the 6th section of the Act, when taken by themselves, would seem very clearly to have barred the right of action if it were not brought by the 1st January, 1870, yet the clear and unmistakable language of the 8th section brought it within the limitation laws, as set forth in the Code. The words of the 8th section as clearly apply to this case as they did in the case of *Black vs. Swanson*. That was an action that accrued after June 1st, 1865. This is a contract made after June 1st, 1865. Both cases are within the express words of the 8th section, and are governed by it.

It is objected that by this construction many actions for

torts would have been barred by the passage of the Act, to-wit: an action for slander or for a personal *tort* committed in July, 1865. That though by the suspension Acts, the right of action therefor may have existed in March, 1869, yet, they would have been *eo instanti* barred at the passage of the Act. Suffice it to say, that in such cases, it would not have been competent for any legislation to have effected such a result, and such actions would at least have been entitled to all the rights secured in the instances of other *torts*, as provided in the 7th section.

It was also objected that the 8th section could not have been intended to take away the benefit of the suspension Acts. No one has ever denied, or can deny, that it did have, and was, without all doubt, intended to have that very effect in all cases of actions which accrued prior to June 1st, 1865. It simply said, that all such actions must be brought by 1st January, 1870. A note was due December 25th, 1862, or December 25th, 1864. Under the operation of the suspension Acts, it would not have been barred until July 21st, 1874. But the iron heel of the Act of March 16th, 1869, limited the right to January 1st, 1870. If plain words accomplished this, equally as plain terms operate on contracts made since June 1st, 1865, and put them within the provisions of another law, as unmistakable as to the time in which actions may be brought, as the Act of 1869. If in the first cases they lose all benefit from the suspension Act, how can the latter escape. Doubtless special cases may be imagined, in which special difficulties arising out of this construction would seem to occur. But even in those, the great fundamental principle that a reasonable time must be provided for creditors in all cases, would meet the necessity that might arise.

It has been further said that the 8th section, in adopting the "limitation laws as set forth in the Revised Code adopted by the Constitution," was intended to take those laws as affected by the Suspension Acts. It is difficult to see the force in this position. There is nothing in the words of the Act or

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the Constitution to suggest it: See Constitution, Article XI, section 3. It would have been a strange and incomprehensible act of legislation to have adopted certain provisions of the Code, which said in plain words, *four* and *six* years, and at the same time intended those words should be changed by the effect of other and temporary acts to mean *five* years and *seven* years, or it might be seven years and nine years; and yet that would be the result in many instances. After the fullest consideration, we feel constrained to hold, that under the 8th section of the Act of March 16, 1869, the provisions of the Code, as to the limitation laws therein, apply to contracts made since 1st June, 1865. And as in this case, no credit by contract or by custom was proven, and as more than four years had expired from the time of making the contract, it being by account, to the bringing of the action, the Court below erred in holding that the plaintiff's right of action was not barred.

Judgment reversed.

WILLIAM U. GARRARD, executor, plaintiff in error, vs. WILLIAM C. DAWSON, defendant in error.

1. The legal representative of a deceased partner may be sued in the same action with the survivor, on a firm contract.
2. Where an action is brought against warehousemen for the value of two bales of cotton entrusted to them, which they had failed to deliver on demand, it was not error in the Court to charge that the plaintiff was entitled to interest on the value of the cotton from the day of the demand as a part of his damages, and to refuse to charge that the jury might allow or withhold interest in their discretion.

Partnership. Warehousemen. Damages. Interest. Before Judge JOHNSON. Muscogee Superior Court. October Term, 1872.

William C. Dawson brought complaint against John R. Ivey, and William U. Garrard, as executor upon the estate of

William W. Garrard, deceased, for \$600 00, upon a contract made by said deceased and Ivey, as warehousemen and partners, under the firm name of J. R. Ivey & Company. Pending the suit Ivey died. The plaintiff suggested his death and dismissed the action as to him.

For the remaining facts, see the decision.

R. J. MOSES, for plaintiff in error.

PEABODY & BRANNON, for defendant.

WARNER, Chief Justice.

1. This was an action brought by the plaintiff against William U. Garrard, executor of W. W. Garrard, and John R. Ivey, who were partners and warehousemen, to recover the value of two bales of cotton. The defendant filed a special demurrer to the plaintiff's declaration for misjoinder of Garrard, as executor, with Ivey, surviving partner, which was overruled, and defendant excepted. The Court charged the jury, among other things, that if they found for the plaintiff, their verdict should be for the value of the cotton not delivered, with interest from the time of demand, and that the principal and interest together would be the amount of damages. The defendant requested the Court to charge the jury that they might allow interest, or withhold it; that the allowance of interest was in the discretion of the jury; which charge the Court refused to give; whereupon the defendant excepted to the charge as given, and refusal to charge as requested. According to the provisions of the 3272d and the 3273d sections of the Code, the demurrer was properly overruled.

2. The cause of action was a debt against copartners on a contract, for the performance of which they were liable. It is true that the 1897th section of the Code declares that the surviving partner, in case of death, has the right to control the assets of the firm to the exclusion of the legal representatives of a deceased partner, and he is primarily liable to the

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creditors of the firm for their debts. The statute, however, gives the right to sue the representative of the deceased partner in the same action with the survivor, without qualification or restriction. If there are any legal or equitable grounds why the representative of the deceased partner should not be made liable for the debt, he can plead and prove the same at the trial, and the verdict can be so moulded as to do full justice to the parties in the same manner as a decree in equity: Code, 3504. The right to join the representative of a deceased partner in the same action with the surviving partner, is one thing. What shall be the liability of the representative of the deceased partner in such an action so brought, will depend on the facts, and the law of partnership applicable thereto; and the verdict and judgment should be rendered in accordance therewith. By allowing the representative of the deceased partner to be joined in the same action with the survivor, the statute does not alter or change the liability of partners, as defined by law, but, on the contrary, it assumes that the representative of the deceased partner will protect himself by pleading any legal or equitable defense he may have to such action so brought against him as the representative of such deceased partner. There was no error, in view of the facts of this case, in the refusal of the Court to charge as requested in relation to the question of interest, or in the charge as given: Code, 2894.

Let the judgment of the Court below be affirmed.

CHARLES W. BASS, plaintiff in error, vs. SAMUEL D. IRVIN,
defendant in error.

1. A Judge of the Superior Court cannot open Court and receive a verdict from the jury on the Sabbath day, and such a verdict so rendered, is illegal and a nullity.
2. Where a verdict has been so rendered and entered by the jury, through mistake, on the wrong writ, on the hearing of a motion at a subsequent term of the Court to transfer the verdict to the proper declaration and

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to enter judgment *nunc pro tunc*, and it appears from the verdict or by the admission of the party, that it was rendered on the Sabbath day, it is proper for the Court to consider that question, if made in the answer to the motion.

Verdict. Sabbath. Practice in the Superior Court. Judgment. Before Judge CLARK. Sumter Superior Court. October Adjourned Term, 1872.

Samuel D. Irvin, as administrator of James Bond, brought ejectment against Charles W. Bass for a lot of land in Sumter county. The verdict of the jury was as follows :

"We, the jury, find for the defendant the premises in dispute, the defendant paying to the plaintiff \$200 00, with interest from December 15th, 1859."

This verdict was entered upon the declaration in the case of Irvin, administrator, vs. Thomas D. Speer, at the October term, 1871. At the October term, 1872, the following motion was made:

"And now, at this term of the Court, comes the defendant and moves the Court to transfer the verdict rendered in this case (Irvin, administrator, vs. Bass,) from a declaration in the case of Samuel D. Irvin, administrator of James Bond, vs. Thomas D. Speer, on which it was written and signed by the jury, by mistake, to the declaration in this case, the motion having been made at the term at which this verdict was rendered, and not heard or disposed of at that term on account of the opposition of defendant's counsel, and his petition to the Court for time to be heard in argument opposing said motion; the plaintiff also moves the Court to enter judgment in said case *nunc pro tunc*."

The defendant showed for cause against said motion, as follows :

1st. That no legal verdict was rendered in said case, the pretended verdict having been returned on the Sabbath day, in the absence of and without the consent of the defendant.

2d. That two declarations, to-wit: the declaration in ejectment, and a declaration in a suit in favor of Irvin, adminis-

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trator, *vs.* Thomas D. Speer, the original purchaser of the land from Bond, on the note given by Speer for the purchase money of said lot, were sent out with the jury, and they wrote their verdict for \$200 00, the amount of the purchase money, on the declaration against Speer.

3d. That the verdict having been received and recorded, the jury dispersed, and the Court adjourned, it is and was too late to alter or transfer the verdict, especially without the re-assembling and concurrence of the jury.

4th. That the case of Irvin, administrator, *vs.* Speer, was afterwards tried (against the objection of Speer's counsel) and dismissed because of the non-payment of taxes, and the judgment of the Superior Court affirmed in the Supreme Court.

5th. That Thomas D. Speer was not a party to the suit in ejectment, and Bass did not purchase the land from Bond or his administrator, but Speer purchased the same from Bond in his lifetime and afterwards sold to Bass, who paid him in full for it under a bond for titles, and, after said payment, remained in possession for more than seven years before the bringing of said suit in ejectment; that he had notice that the title was in Bond, and that the purchase money was not paid therefor.

6th. That there was no allegation in the pleadings that Bass owed Bond or his administrator one cent for the land, and there was no money demand in the plaintiff's declaration against Bass or any one else for the purchase money.

The motion was sustained by the Court, and the defendant excepted.

C. T. GOODE, for plaintiff in error.

W. A. HAWKINS; R. F. LYON, for defendant.

TRIPPE, Judge.

1. The verdict was received in Court on the Sabbath day, in the absence of the excepting party, and without his consent. The question is, can a Judge of the Superior Court

open his Court and receive a verdict from the jury on the Sabbath. We think this has been settled in the negative by a long line of decisions, English, American and of this Court. It is only necessary to refer to some of our own decisions, as they cover the whole question, and contain references to many others to which any one, desirous to make a thorough investigation, can look. If for upwards of twenty years, more than one decision of this Court has stood untouched by any legislation to change the law as therein adjudged, there is no necessity to go farther. In the case of *John Neal vs. W. F. Crew*, 12 *Georgia*, 93, it was held that "Sunday is not to be counted as one of the *four days* in which appeals were allowed to be entered." The reason given was that if an appeal were entered on Sunday, it would be void. In the argument reaching that conclusion, the whole question was reviewed, the authorities given and the position clearly assumed, that Sunday was *dies non juridicus*. In the same volume, page 380, *Cheeseborough, etc., vs. Vanness*, it was stated that it was held in *Neal vs. Crew*, that Sunday was not a day for the transaction of judicial business. In the case of *Cheeseborough vs. Vanness*, the Judge of the Court of Common Pleas of Augusta, had appointed a day for a special session. By oversight on his part the day appointed, was Sunday. He opened Court and adjourned until next day, without transacting business. The objection was made on Monday that the order appointing the session, was void, because it appointed Sunday; and, also, that the adjournment on Sunday was void. It was held by this Court, that in this State, Sunday is not a day for the transaction of judicial business, and when a day was appointed to hear a special case, which, by mistake, fell on Sunday, *the case would necessarily stand over until, Monday, the next working day, without any formal meeting and adjournment of the Court for that purpose.* The meeting and adjournment on Sunday was considered as a mere nullity. The same principle is recognized in *Gholston vs. Gholston*, 31 *Georgia*, 638. Section 4579, New Code, makes it criminal for any "person whatever," to pursue their

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business, or work of their ordinary calling on the Lord's day. This is substantially the same as the second section of the Colonial Act of 1762, under which the foregoing decisions were made.

It has been held that a note made on the Sabbath day, in pursuance of trade or business, is void: 41 *Georgia*, 449. Also, that a payment on Sunday on a note, due to a merchant, being a transaction in violation of law, is not such acknowledgement of the debt as will take it out of the statute of limitations: 31 *Georgia*, 607. No attachment or bail process could issue on the Sabbath day, unless by authority of special law, and then only under special circumstances, which must be sworn to by the applicants. The Constitution excepts Sunday from being one of the five days allowed the Governor for the revision of bills which have been passed by the General Assembly. In every form—by all the different authorities of this State—by its organic law—its civil and criminal Code, and by every judicial decision upon the question, the Sabbath day is regarded as the Lord's day, and it is protected from violation by so many guards that the Courts should not be allowed to invade its sanctity, and in so doing make a record to be read by all men in all time.

In *Davis vs. Fish*, 1 Green, (Iowa,) 410, the very point before us was made and decided as we decide this. Similar authorities might be cited without number—authorities sustaining the principle upon which we rest this decision, even had we to go outside our own State for them.

2. The verdict in this case having been received in Court, opened on the Sabbath day for that purpose, was an illegal verdict and a nullity; and, being this, the objection was properly taken, at the proper time, and should have been sustained by the Court.

Judgment reversed.

JOHN GEORGE, plaintiff in error, vs. JAMES GARDNER, defendant in error.

1. The foreclosure of a mortgage is a suit, within the contemplation of the Act of March 16th, 1869; and if the instrument was executed before June 1st, 1865, and proceedings to foreclose were not instituted until after January 1st, 1870, they are barred by the provisions of said Act.
2. The Act of 1869 is a general law, and has a general operation throughout the State as to that class of contracts specified in it, and, therefore, does not come within the purview of the 26th section, 1st Article, of the Constitution of 1868.
3. This Act does not impair the obligation of the contract; it only affects the remedy.
4. The plaintiff having an agent in this State in possession of the mortgage, and having control of its collection, the fact that he was a resident of Ireland, will not prevent the statutory bar.
5. The credits on the notes, to secure which the mortgage was given, not being made by the mortgagor, or by any one authorized by him, do not renew the right of action.
6. As to the suggestion of fraud, if there was any evidence of it to prevent the running of the statute of limitations, that was a question of fact for the decision of the Court, under the submission of the parties, and this Court will not interfere.

Statute of limitations. Mortgage. Constitutional law. New trial. Before Judge GIBSON. Richmond Superior Court. October Term, 1872.

For the facts of this case, see the decision.

McLAWS & GANAHL, for plaintiff in error.

The Act of 1869 does not include liens, certainly not mortgages on realty, because—

1st. The word "action" does not include statutory remedy to foreclose a lien: Code, sec. 4; 4 Ga., 486; Angell on Lim., 73; 8 Ga., 321, as it does not include dower, distress, ousting a tenant, rules vs. sheriffs and other officers, etc.

2d. The Act of 1869 does not refer to liens; so far as it relates to actions *ex contractu*, it repeals by 2d provision: Code, sec. 2863; 3d, sec. 2864; 4th, secs. 2866–7; 5th, sec. 2871; 6th, sec. 2872. All cases not of this character (*i. e.*

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not set out in the above sections of the Code), are provided for by Act of 1869, and no more; *vide* last section of Act of 1869.

3d. Because if foreclosure of a mortgage lien were within the words it would not be within the spirit of the Act, just as mortgage judgments are not within the dormant judgment Act: 7 Ga., 495; and *sci. fa.*, is not a civil case within the provision of the Constitution requiring all *civil cases* to be brought in the county of the residence of defendant: 10 Ga., 557.

4th. Because the effect and consequences would be absurd: Black's Com., p. 60.

5th. Because such a construction would impair the obligation of the contract: Const. U. S., Art. I, sec. 10; Const. Ga., Art. I, sec. 1; *Bronson vs. Kinzie*, 1 How., 311; *McCracken vs. Haywood*, 2 How., 608; *Grantley vs. Ervin*, 3 How., 707; *LeRoy vs. Crowningshield*, 2 Mason, 175, 176; *Hardeman vs. Downer*, 39 Ga., 429.

1st. Did the Act of 1869 include foreclosure of mortgages in language or spirit? We reply—

1st. Acknowledgment and new promise: *Angell on Lim.*, 208, 234.

2d. Payments entered on the written evidence of the debt by the plaintiff or his authority: Code, sec. 2884.

3d. New promise in writing by plaintiff or by his authority after the foreclosure: Code, sec. 2883.

4th. Fraud and estoppel: Code, secs. 3116, 3126; *Guerin vs. Danforth*, 45 Ga., 495.

5th. In this case, neither plaintiff nor defendant were in the State during the whole period of limitation.

FRANK H. MILLER; W. H. HULL, for defendants.

I. The debt sued for is barred by the statutes of limitation.

1st. The statute of force at the making of the contract, January 1, 1857, governs as to the contract and new promise: 28 Ga., 310.

2d. This debt should have been renewed by promise in

writing, signed by Gardner or some person by him authorized: Acts February 20, 1854, March 6, 1856, section 25.

3d. Entries of credits in the presence of the maker or person making them do not keep the debt in life: 20 Ga., 94, 22 Ga., 343, 32 Ga., 602, 34 Ga., 245, 36 Ga., 538.

4th. The same defense exists as against a suit on the debt: Code 3888, and the debt is certainly barred by Act of March 16, 1869.

5th. The mortgage itself as a sealed instrument is barred: Section 3, Act March 16, 1869.

II. The exceptions to the limitations in the Code do not apply to cases arising under the Limitation Act of March 16, 1869 1 Kelly, 32, *Adam vs. Davis*, decided August 13, 1872; 46 Ga., 126.

III. No new promise has been made by Gardner, or by any person by him authorized in writing. As to what a new promise must contain, see 6 Ga., 31, 486, 587, 9 Ga., 418, 32 Ga., 602, 36 Ga., 538; but it is insufficient to refer to notes generally: 32 Ga., 119; any dispute is a question of fact for the jury: 6 Ga., 21, 486. The Judge acting here as the jury, his finding will not be disturbed: 41 Ga., 437, 32 Ga., 119, 45 Ga., 167, *Anderson vs. Howard & Sons*, decided August 12, 1873. After the statute has run, a debtor's rights become vested, and cannot be affected by legislative action: 41 Ga., 231. The debt being then absolutely barred, January 1, 1870, the question of consideration for future indulgence is excluded.

IV. The offer of Stockton cannot affect Gardner's rights nor bind him.

V. The statutes of limitation confer a legal right, and it is not *fraud* to plead it: 6 Ga., 31.

WARNER, Chief Justice.

At the January term, 1871, of Richmond Superior Court, John George petitioned the Court to foreclose a mortgage made by James Gardner to him on certain real estate described therein as set forth in the record. The mortgage was

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executed on the 1st day of January, 1857, to secure the payment of two promissory notes for \$3,000 00 each, due at one and two years after date, the notes having the same date as the mortgage, which was duly recorded on the 16th of January, 1857. The following is a copy of the notes with the endorsement and credits thereon :

"\$3,000 00.

AUGUSTA, January 1, 1857.

"Twelve months after date I promise to pay to the order of John George \$3,000 00, for value received, with interest from date. (Signed) JAMES GARDNER.

"Endorsed: JOHN GEORGE.

"Received note for the interest to 1st January, 1858, B. B.; received interest to 1st January, 1859, on within, B. B.; received interest to 1st January, 1860, on within, B. B.; received interest on the within note to 1st January, 1861, B. B.; received interest on the within note to 1st January, 1863; received on account \$500 00, 23d January, 1868; received on account \$750 00, May 14, 1870. Received interest in full to 1st July, 1870—July 18, 1870."

"3,000 00.

"Two years after date I promise to pay to the order of John George \$3,000 00 for value received, with interest from date. (Signed) JAMES GARDNER.

"Augusta, January 1st, 1857.

"Endorsed: JOHN GEORGE.

"Received interest to 1st January, 1859, on within, B. B.; received interest to 1st January, 1860, on the within, B. B.; received interest on the within note to 1st January, 1861, B. B.; received interest to 1st January, 1863, on within note, B. B.; received on account within \$250 00, March 18th, 1869; received, Augusta, 24th May, 1869, \$250 00 on account within; received, Augusta, 6th June, 1870, \$500 00 on account within note; received, on 27th July, 1870, on account interest, \$326 41; September 7, 1870, received \$326 41; received interest to July 1, past."

At the trial of the case, the following facts were agreed to and submitted to the Court for its judgment thereon:

"John George became a citizen of the United States September 21st, 1842, and resided in Augusta until May ..., 1854, when he removed to Ireland, where he has ever since resided. He visited Georgia at the time of the date of the mortgage, January 1st, 1857, and then sold and conveyed the mortgaged premises to James Gardner, describing himself in the deed as of Richmond county. Gardner paid all the purchase money but \$6,000 00, and for this sum executed two notes for \$3,000 00 each, payable, one at one year and the other at two years from January 1st, 1857, and the mortgage on the premises, the foreclosure of which is now being resisted. The notes were not paid at maturity, but the interest was paid at stated intervals and indulgence asked for the principal, by Gardner, and granted by George. After the sale and mortgage, George returned to Ireland, and left with Bernard Bignon, of Augusta, the unpaid notes. He returned to Georgia in 1859, and then went back to Ireland, where he has since resided, never having removed the notes from Bignon's hands. Bignon collected the interest for George, and managed his other property in Georgia, and returned them for taxation, to 1867, inclusive, when, being informed the debt was not liable for taxation under the laws of Georgia, he ceased to do so. On the 28th day of October, 1863, James Gardner sold the mortgaged premises to George T. Barnes, John L. Stockton, and others, as tenants in common—Gardner agreeing to pay off the mortgage. These parties carried on the business of the Constitutionalist newspaper, under the name of Stockton & Company. Stockton and Gardner, in the course of time, bought out the interest of all the other partners, except Lawrence D. Lallerstedt, and with him owned the mortgaged premises until December 22d, 1870. The parties who purchased, bought with full notice of the mortgage, and subject thereto, for the unpaid purchase money held by George, and Gardner in his deed to them having covenanted to pay it off.

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"James Gardner removed to New York April 1st, 1867, and resided there until October 17th, 1870, when he returned to Georgia, occasionally visiting Georgia in the *interim*; and on the first day of February, 1871, became editor again of the Constitutionalist newspaper, which was published and its business carried on in the mortgaged premises.

"John L. Stockton & Company, the managing partner of the firm of Stockton & Company, acting for Gardner, paid the interest on the notes, from time to time, to Bernard Bignon. On the 18th of July, 1870, he paid the interest to 1st July, 1870, in full, on one note; on the 27th of July, 1870, he paid part of the interest to July 1st, 1870, on the second note; and on the 7th of September, 1870, he paid the interest on the second note to July 1st, in full. When these payments were made of interest to Bignon, Stockton took no receipts, but instructed Bignon to indorse the receipts of the same on the notes, which was done by Bignon in each case, in Stockton's presence, at the time of payment, by his direction, at his desk, and under his inspection.

"In the month of March, 1870, the interest on the notes being greatly in arrears, John L. Stockton, of Stockton & Company, then composed of John L. Stockton, L. D. Lallerstedt, and James Gardner, owners of the mortgaged premises, proposed in writing as follows:

"'We propose to pay Mr. George \$700 00 cash, and the balance of the interest to July 1, 1870, in three equal payments, on May 1st, June 1st, and July 1st, and to pay the principal in January or February next.

STOCKTON & COMPANY.'

"This proposal was submitted to George by Bignon, who subsequently verbally informed Stockton that it was agreed to by John George. Seven hundred and fifty dollars was paid on May 14th, 1870, by Stockton & Gardner, and the rest of the interest at the time set forth above. The principal being demanded of Gardner, who refused at that time, the mortgage was placed in the hands of McLaws & Ganahl for foreclosure,

and rule *nisi* taken at the January term, 1871, and copy of rule served on James Gardner, when engaged on the premises of the mortgaged property as editor of Constitutionalist newspaper, and the business carried on as before, in the name of John L. Stockton & Company, and by John L. Stockton and Frank M. White.

"James Gardner became insolvent in New York, October 31st, 1870. Prior to that time, October 24th, 1870, he executed to Thomas A. Hoyt, his partner, a blank mortgage on his three-fifths interest in the Constitutionalist newspaper, including the mortgage premises, which Hoyt filled up to the amount of \$30,000 00; which sum is larger than the value of the whole mortgage property, and far exceeded the interest of said Gardner, but which is contested by Gardner, as illegal and void, because it was not used or filled up as understood with him by his partner, Hoyt.

"Thereafter, to-wit: on the 22d December, 1870, James Gardner gave a deed to his interest in the Constitutionalist, including the premises thus incumbered by John George's mortgage, and the others, to his brother-in-law, Frank M. White, a citizen of and resident of Memphis, Tennessee, who, as purchaser, had notice of the value of the property, and of the incumbrance, and the denial of the correctness of the Hoyt mortgage. Said deed was recorded January 23d, 1871, in Richmond county.

"The Constitutionalist newspaper, on the premises, continued to be published as heretofore, under the name of Stockton & Company, by Stockton and White, they having purchased Lallerstedt's interest, March 14th, 1871.

"An offer was made in 1861 or 1862, by Gardner, to pay the note in Confederate money, to Bernard Bignon, who, not being authorized to receive it, and not being able to communicate with George, refused to receive it.

"John L. Stockton was, during the whole period of the management of the Constitutionalist by the former name of Stockton & Company, the managing partner of the Company.

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"The within agreed upon as facts, subject to all exceptions thereto for irrelevancy and inadmissibility, December 21st, 1872. (Signed)

FRANK H. MILLER,
Attorney for Gardner.
McLAWS & GANAHL,
Attorneys for George."

Gardner, the mortgagor, pleaded the statute of limitations of 1869 in bar of the foreclosure of the mortgage. The Court sustained the plea, and dismissed the plaintiff's petition and rule *nisi* for foreclosure of the mortgage as prayed for, and the plaintiff excepted. The 3d section of the Act of 1869 declares that all actions on bonds or other instruments under seal, which accrued prior to 1st of June, 1865, not now barred, shall be brought by 1st January, 1870, or the right of the party plaintiff or claimant, and all right of action for its enforcement shall be forever barred. The 6th section of the Act further declares that all other actions upon contracts, express or implied, or upon any debt or liability whatsoever, due the public or a corporation, or a private individual or individuals, which accrued prior to the 1st June, 1865, and are not now barred, shall be brought by 1st January, 1870, or both the right and the right of action to enforce it, shall be forever barred. This Act was passed the 16th of March, 1869, and gave the plaintiffs nine months and a half thereafter, within which they must institute their suits or actions, on the class of debts or claims therein specified, or be forever barred. There can be no doubt, we think, as to the intention of the General Assembly in the enactment of this statute. With its policy or expediency, the Courts can have nothing to do; their plain duty is to enforce it, if it be a valid constitutional law, though its policy or expediency, as applicable to the case before us, is not very apparent. By the laws of this State, a mortgage is only a security for the payment of the debt; and the plaintiff now seeks to enforce its payment by the foreclosure of his mortgage. The mortgage sought to be foreclosed, is an instrument under seal, and is dated prior to the 1st of June, 1865, and the plaintiff's right to foreclose it

had accrued at the time of the passage of the Act of 1869, but was not then barred, and would not have been for several years, had it not been for that Act, which declared that if the plaintiff did not prosecute his remedy by suit or action to enforce it by the 1st of January, 1870, he should be forever barred.

The plaintiff did not institute any proceeding in the proper Court to foreclose the mortgage until January, 1871. The argument for the plaintiff here, however, is, that the proceeding to foreclose a mortgage lien under the provisions of the 3886th section of the Code, is not a suit or action, as contemplated by the Act of 1869, and, therefore, not within its provisions. This argument, on examination, will be found to be more specious and plausible than sound. The proceeding specified in our Code for the foreclosure of a mortgage on real estate is a simple, cheap substitute for a bill in equity for that purpose, but it is, nevertheless, a suit or action, and the plaintiff must petition the Court as in other ordinary suits or actions.

Ordinary suits in the Superior Court are commenced by petition to the Court: Code, 3256. Where the petition, in either case, is filed in the clerk's office, the date of the filing thereof is the commencement of the suit or action, as well a petition to foreclose a mortgage as any other petition for a remedy to enforce a right, or to redress a wrong. An action as defined by our Code, is merely the judicial means of enforcing a right, 3186. An action may be against the person, or against the *property*, or *both*, 3187. See, also, section 2217. The petition to the Court to foreclose the mortgage was an *action* against the mortgagor and the property mortgaged, as contemplated by the Act of 1869, and is within the provisions of that Act.

The Act of 1869 is a general law, and has a general operation throughout the State, as to the class of contracts specified in it, the private rights of no particular individual are *specially* varied or affected by it, as contemplated by the 26th section of the first Article of the Constitution of 1868. This construction of the Act of 1869 does not invade or impair the

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obligation of the plaintiff's *contract* and thereby render the Act unconstitutional, it only affects his *remedy* on that contract, that is to say, it prescribes the period of time within which he should enforce his remedy thereon in the Courts of the State. In the opinion of the General Assembly, nine months and a half, was a reasonable time within which plaintiffs should have their remedy to enforce the class of debts or claims specified in the Act, and we cannot say that the time was so short or unreasonable as to make the Act unconstitutional: *Bacon et al. vs. Howard*, 20 Howard's Reports, 23; *McElmyre vs. Cohen*, 13 Peters' Reports, 312; *Townsend vs. Jemison*, 9 Howard's Reports, 407. It is true, the plaintiff was resident in Ireland, but he had an agent here looking after this particular claim who had the possession and control of the papers appertaining to it, and was doubtless entrusted with its management and collection, by the plaintiff.

In regard to the credits on the notes, the same were not made by the mortgagor, either in his own handwriting or subscribed by him, or by any one authorized by him, within the true intent and meaning of the 2883d and 2884th sections of the Code: *Green vs. Hall*, 36 Georgia Reports, 538. The mortgage was executed by Gardner alone, and the action to foreclose it was instituted against him as mortgagor to show cause why it should not be foreclosed, and not against Stockton & Company, who were not parties to the mortgage. As to the suggestion of fraud, if there was any evidence of it to prevent the running of the statute, that was a question of fact for the decision of the Court, under the submission of the parties, and the Court having rendered its judgment on the evidence before it, this Court will not interfere to control it.

In our judgment, there was no error in the Court below in holding and deciding that the plaintiff was barred of his right of action to foreclose his mortgage against Gardner, the mortgagor, under the provisions of the Act of the General Assembly, passed on the 16th of March, 1869, on the statement of facts disclosed in the record.

Let the judgment of the Court below be affirmed.

CHARLES WEST, *alias* LOUIS JOHNS, plaintiff in error, *vs.*
THE STATE OF GEORGIA, defendant in error.

According to the decision in *Johnson vs. The State*, rendered at the January term, 1873, where the indictment is for arson, in burning an occupied dwelling house, other than in a city, town or village, and the jury render a verdict of guilty, with a recommendation to the mercy of the Court, such a verdict is uncertain and illegal, and should be set aside. A verdict in such cases, where the defendant is convicted, should be a general verdict of guilty, or guilty, with a recommendation that he be confined in the penitentiary for life. The jury may, in all capital cases except for murder, recommend the commutation, whether the conviction is or is not founded solely on circumstantial testimony.

Criminal law. Verdict. Recommendation to mercy. Before Judge CLARK. Sumter Superior Court. October Adjourned Term, 1872.

West, *alias* Johns, was placed upon trial for the offense of arson, alleged to have been committed on the 3d day of August, in the year 1872, on an occupied dwelling house, not in a city, town or village. The defendant pleaded not guilty. The jury found the defendant guilty, and recommended him to the mercy of the Court. The Court sentenced him to be hung. To which judgment the defendant excepted, insisting that it could not be supported by the verdict.

W. A. HAWKINS, for plaintiff in error.

C. F. CRISP, Solicitor General, by PHIL. COOK, for the State.

TRIPPE, Judge.

This case is controlled by the two cases, *John R. Johnson vs. The State*, and *Allen Stallings vs. The State*, both decided at the January term, 1873. Each of those cases, as well as this, was a conviction on an indictment for arson, the burning of an occupied dwelling house. The verdicts in all three were guilty, with a recommendation to the mercy of the Court.

Reagan *et al.* vs. Galloway.

In *Johnson vs. The State*,^{*} it was held that such a verdict, in such a case, was an illegal verdict. In *Stallings vs. The State* it was held, that under the Act of 13th December, 1866, Revised Code, section 4311, a jury could, in such cases, recommend the commutation of the death penalty to imprisonment in the penitentiary for life, and applied the rule to all capital offenses, except murder, without reference to the character of the testimony, whether or not it was circumstantial.

This case falls within the rule held in *Johnson vs. The State*, and without repeating again what was said during the present year, in both of those cases, we pronounce that the Court erred in sentencing the defendant to be hung, under the verdict that was rendered.

In all such verdicts the Court should, before finally receiving them, cause the jury to correct them, so as to be in conformity with the law, either by amending the recommendation or by striking it out. And to this end, they, the juries, should be fully instructed as to what their power is in such cases.

Judgment, reversed.

JOSEPH REAGAN *et al.*, plaintiffs in error, vs. WILLIAM GALLOWAY, defendant in error.

- * Where the failure of title, set up as a breach of warranty in defense to a suit for the purchase money of land, was the result of the act of the defendants, a verdict for the plaintiff will not be interfered with.

New trial. Warranty. Before Judge HALL. Rockdale Superior Court. February Adjourned Term, 1873.

For the facts of this case, see the decision.

CLARK & PACE; PEEPLES & HOWELL, for plaintiffs in error.

J. J. FLOYD, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendants, to recover the sum of \$500 00, the same being the balance due the plaintiff for a tract of land in Rockdale county. On the trial of the case, the jury found a verdict for the plaintiff, whereupon the defendants made a motion for a new trial on the several grounds stated therein, which was overruled, and the defendants excepted.

It appears from the evidence in the record that the plaintiff sold the tract of land to Stewart for the purpose of erecting a distillery thereon. Stewart paid \$500 00, one-half of the purchase money, and gave plaintiff his note for \$500 00, the plaintiff giving Stewart his bond to make him a title to the land when the note was paid. A short time before the note became due, Reagan, one of the defendants, stated to plaintiff that they had bought an interest in the land and distillery from Stewart, and proposed to the plaintiff, as a matter of accommodation to them, that he should take their note in the place of Stewart's note for the balance of the unpaid purchase money due for the land, and make them a deed to the land instead of Stewart. Plaintiff, with Stewart's assent, consented to this arrangement, made a warranty deed to the defendants for the land, Stewart giving up to plaintiff his bond, and offered to Reagan, Stewart's note, when he said, "hold that note until Webb comes up in a few days and we will give you our note," which they have not done, or paid for the land. At the time of this transaction the defendants were in possession of the land and distillery, and had been for some time previous thereto, and continued in possession thereof until the same was sold, as hereinafter stated. The defendants pleaded in defense of the plaintiff's action a breach of the warranty of title to the land contained in the plaintiff's deed to them. It appears in the record that after the sale of the land to Stewart, to-wit: on the 7th of June, 1869, the plaintiff executed under his hand and seal an instrument in writing granting his consent to Parr to erect and carry on a distillery on the land, re-

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citing therein that it was the land which he had sold to Parr and Stewart, on the 10th day of October, 1868, and that it should be subject to the revenue laws of the United States for taxes and penalties which shall have priority of any claim of mine. In case of the forfeiture of the distillery premises, or any part thereof, the title to said land shall vest in the United States, discharged from any claim I have on said land. This instrument was recorded 16th August, 1869. The deed of plaintiff to defendants was executed on the 13th of November thereafter. There is some conflict in the evidence as to whether the defendants had actual notice of this instrument, independent of its being recorded at the time of the execution of the warranty deed to them by the plaintiff. The distillers in possession of the land failed to pay the revenue tax due the United States, and the land was sold for the payment thereof, and the question is, whether the defendants, under the facts of the case, can plead the same as a breach of the plaintiff's warranty of title to the land in bar of his right to recover the balance of the purchase money for the land due by them therefor.

There is no pretense that the plaintiff did not have a good title to the land when he sold to Stewart, but it is said he created a lien upon it by the instrument executed on the 7th June, 1869. By that instrument, he consented for the distillery to be created on the land, waived the priority of his claim, and consented that the title to the land should vest in the United States, discharged from any claim which *he* might have upon the land, in case of the forfeiture of the distilling premises, under the revenue laws of the United States for taxes and penalties.

There was no *lien* created on the land by any *act* of the plaintiff; that instrument never would have created a lien on the land without something more, and what was that? The failure to pay the revenue tax to the government for carrying on the distillery on the land. Whose act was that? It was the act of the defendants and their associates, who were in possession thereof. The evidence shows that the defendants

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were in the possession of the land and distillery for some time before the deed was made by the plaintiff to them, and continued in possession until the land was sold. It was their act in failing to pay the revenue tax that created a lien on the land and caused it to be sold. If they had performed their duty in that respect, the instrument executed by the plaintiff would not have done them any harm, or have interfered with their title to the land. The instrument executed by the plaintiff on the 7th of June, 1869, did not create any lien on the land, but the failure of the defendants, who were in possession of it, carrying on a distillery, did, by failing to pay the revenue tax, and this lien was created by their own act, after the execution of the plaintiff's warranty deed of the land to them, consequently, they cannot set up their own wrongful act subsequent to the making of the warranty deed to them by the plaintiff, which created the lien under the revenue laws of the United States, by which the land was sold, as a breach of the plaintiff's warranty of his title to the land, so as to avoid the payment of the balance of the purchase money due by them to the plaintiff therefor. To allow them to do so, under the facts disclosed by the record in this case, would be contrary to the plain principles of justice, equity and fair dealing. We find no error in the charge of the Court to the jury, in view of the facts disclosed in the record. The verdict rendered by the jury did substantial justice between the parties, and we will not disturb it.

Let the judgment of the Court below be affirmed.

ARCHIBOLD L. CAMP, plaintiff in error, vs. NANCY PHILLIPS, administratrix, defendant in error.

To entitle a party to recover back money which he has paid, on the ground that it was paid to the defendant through a mistake or ignorance of facts, which he sets up as showing there was no legal liability on him to pay, the plaintiff should allege and show on the trial that at the time of the payment he was mistaken as to such facts, or ignorant of their existence.

Mistake. Before Judge GREEN. Newton Superior Court. September Term, 1872.

Nancy Phillips, as administratrix of Noah Phillips, deceased, brought assumpsit against Archibold L. Camp, for \$650 00, besides interest, making the following case:

Defendant asserted to plaintiff that he held a judgment against her intestate, rendered at the September term, 1860, of Newton Superior Court, for \$2,000 00, principal, and \$766 10 interest, to date of judgment. Plaintiff, deceived by this wrongful and fraudulent claim, on March 5th, 1867, paid to defendant the sum of \$650 00 on the *fi. fa.*, issued from said judgment. In reality, said judgment had been satisfied in full by plaintiff's intestate, during his life, but this fact was unknown to her at the time of said payment. Defendant refuses to refund said sum of money, and hence this suit.

The record fails to disclose the defendant's plea.

The evidence made the following case: On October 7th, 1868, the execution referred to in the declaration was levied upon property of plaintiff's intestate. The plaintiff availed herself of the Relief Act of 1868. Upon the trial of the issue thus formed, the jury found that the execution had been satisfied. A new trial was moved for and refused, which judgment was affirmed in the Supreme Court: See *Camp vs. Phillips, administratrix*, 42 *Georgia Reports*, 289. The plaintiff introduced the entire record of the above stated case, and proved by Thomas M. Meriwether, the foreman of the jury rendering the above verdict, that upon the trial of said case, the receipt of \$650 00, of date March 5th, 1867, on said execution, was not considered by the jury in finding in favor of movant; that the jury found that the execution had been paid off during the lifetime of plaintiff's intestate, and before the said \$650 00 payment had been made; that the jury returned into the Court-room during their deliberations, and asked instructions of the Court, as to whether they should consider the payment of the \$650 00 so as to allow them to find that amount in favor of the movant against the plaintiff

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in execution; that the Court instructed them that under the state of the pleadings they could not so find; that they then excluded said payment from further consideration and found the execution nevertheless paid off.

The plaintiff closed, and the defendant introduced no testimony. The Court charged the jury, that if they believed from the evidence that the plaintiff paid the money sued for, under a mistake of law or of fact, they must find for the plaintiff.

The jury returned a verdict for the plaintiff for the full amount sued for, with interest. The defendant moved for a new trial because of error in the aforesaid charge, and because the verdict was contrary to said charge and the evidence. The motion was overruled and defendant excepted.

J. J. FLOYD, for plaintiff in error.

A. M. SPEER, for defendant.

TRIPPE, Judge.

It was decided during the present term in *Arnold & DuBose vs. The Georgia Railroad and Banking Company*, that money voluntarily paid by a party through mere ignorance of law, though he may not have been legally bound to pay it, could not be recovered back. If it be paid under a mistake of facts or ignorance of facts, the rule may be different. For instance, if the facts of which the party so paying was ignorant, be such as to show that the one receiving the money ought not in equity and good conscience to retain it. But to entitle one to a recovery, the ignorance of the facts relied on should be alleged and proved to have existed at the time of the payment. If knowledge of such facts exist at that time, the party cannot, on ascertaining that they would have constituted a legal defense, call upon the Courts to revoke what he has voluntarily done: See case referred to above, *Arnold & DuBose vs. Georgia Railroad and Banking Company*, and authorities there cited.

Judgment reversed.

Cothran vs. Donaldson.

HUGH D. COTHRAN, administrator, *et al.*, plaintiffs in error,
vs. JOSEPH DONALDSON, defendant in error.

1. Where a case was submitted to the jury upon the agreement of counsel, that should they make a verdict before the Court convened on the next morning, the foreman might take the papers and the jury disperse; which course was pursued, but upon the assembling of the jury on the succeeding day, the foreman stated to the Court that, on the previous evening, the jury had agreed upon a verdict, but that he, after they had dispersed, had become satisfied that there was an error in it, and asked that the jury be remanded to their room that the error might be corrected, it was error in the Court, after asking them in a body if any one had tampered with them or attempted to influence their opinions in any way in the matter, to which none of them made any reply, except that two of them stated that the sheriff and another person had asked them if they had agreed upon a verdict, to accede to the request of the foreman.
2. If the verdict was merely imperfect and informal, but the intention of the jury was clearly expressed, then the Court should have had the verdict put in proper form in accordance with that intention. If, however, the verdict was so defective as to be void, under the law, then the Court should have set it aside and declared a mistrial.

Practice in the Superior Court. Jury. Verdict. Mistrial.
Before Judge HARVEY. Bartow Superior Court. March
Term, 1873.

For the facts of this case, see the decision.

ROBERT T. FOCHE; JOHN W. WOFFORD, for plaintiffs in
error.

W. T. WOFFORD; A. JOHNSON, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendants on a promissory note for the sum of \$4,181 00, dated 1st May, 1860, due one day after date, on which there were several credits. On the trial, the jury found a verdict for the plaintiff for the sum of \$4,936 41. The plaintiff remitted the sum of \$1,255 41, leaving the verdict to stand for the sum of \$3,681 00. The defendants made a motion for a new

trial, on the several grounds stated therein, which was overruled, and the defendants excepted. It appears from the record and bill of exceptions that after the jury had been charged by the Court with the case, the Court adjourned until the next morning, the counsel for the respective parties consenting that if the jury agreed on a verdict before the Court convened the next morning, that the foreman of the jury might retain the verdict and return it in open Court. When the jury reassembled the next morning, the foreman stated to the Court, that on the previous evening the jury had made a verdict, but he had, during the night, and after the jury had dispersed, become satisfied there was an error in the verdict, and that he wanted the jury sent back to their room that the verdict might be corrected. The Judge certifies, in the bill of exceptions, that the verdict was imperfect and informal, but in what respect, it does not appear. The defendants' counsel objected to the resubmission of the case to the jury, for the reason that they had dispersed and could no longer be the jury in the case. The Court, however, swore the jury, and asked them, in a body, if any one had tampered with them, or attempted to influence their opinions in any way in the matter, to which none of them made any reply, except that two of them stated that the sheriff and another person had asked them if they had agreed to a verdict. The case was then, against defendants' objection, resubmitted to the jury, by the Court, they retiring to their room, and after being out several hours, returned the verdict hereinbefore set forth.

If the verdict was merely imperfect and informal, but the intention of the jury clearly expressed, then the Court should have had the verdict put in proper form, in accordance with that intention. If, however, the verdict was so defective as to be void, under the law, then the Court should have set it aside and declared a mistrial in the case. What was the matter with the verdict, the record does not inform us. But it was error in the Court to submit the case to the jury again for their consideration, against the defendants' objections, after

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they had dispersed, because the foreman of the jury said he was not satisfied with the verdict. The swearing of the jury did not help the matter, as only two of the jurors answered the questions put to them by the Court in relation to their having been influenced or tampered with. It would be an unsafe and dangerous rule to establish, that a verdict rendered by a jury, under the statement of facts disclosed by the record in this case, should stand. But for this error of the Court, we should not have been disposed to have interfered with the judgment, although we do not think the case was very clearly and fairly submitted by the Court to the jury in its charge.

Let the judgment of the Court below be reversed.

CALEB TOMPKINS, plaintiff in error, *vs.* LEWIS TUMLIN *et al.*,
defendants in error.

A defendant in execution, though he may have equities which would entitle him to file a bill for the purpose of setting aside the judgment on which the execution issued, has no right, unless he shows special reasons therefor, to enjoin the levy and sale, under the execution, of property which he alleges in his bill belongs to and is in the possession of another person. Such owner of the property may assert his own rights in the premises in such a way as the law provides, and the defendant's right can be determined on the final trial of his bill.

Injunction. Judgment. Execution. Levy and sale. Before Judge McCUTCHEN. Bartow County. At Chambers. August 15th, 1873.

Caleb Tompkins filed his bill against Lewis Tumlin and James Kennedy, sheriff of Bartow county, making, substantially, the following case:

The defendant, Lewis Tumlin, is seeking to enforce an execution against the complainant for the sum of \$100 00 principal, and \$69 00 interest, issued by James Milner, Notary Public and *ex officio* Justice of the Peace, on January 31st,

1872. On February 2d, 1872, one A. B. Harrison, a constable, did levy said execution on one acre of land, more or less, being a part of lot of land number four hundred and eighty-one, in the fourth district of the third section of Bartow county, and being a part of the premises now owned and occupied by Emily B. Baker, as the property of complainant. Said constable has turned over said execution and levy to James Kennedy, sheriff of said county, who has advertised said lots to be sold on the first Tuesday in August, 1873.

The bill then proceeds to state that the execution is based on no valid judgment, and to elaborate the reasons for this assertion. It prays that the defendants be enjoined from proceeding with said levy until the further order of the Court; that the defendant, Tumlin, be required to show that said execution is based upon a valid judgment before he be allowed to proceed with its collection; that the writ of subpoena may issue.

The Chancellor refused the injunction, and complainant excepted.

M. R. STANSELL; J. L. MOORE, for plaintiff in error.

R. H. MURPHY, by PEEPLES & HOWELL, for defendants.

TRIPPE, Judge.

The complainant, in his bill, alleges that the property levied on belongs to, and is in the possession of, a third person. If that be true, there is no necessity for his filing this bill to enjoin the proceedings under the levy. He shows no special reasons therefor. That third person is not a party to the bill, nor is asking any relief. The law affords him ample remedy for his own protection, when he seeks to assert his legal or equitable rights. There can, therefore, be no reason to grant the complainant an injunction, when, so far as appears, no damage is threatened him. His bill may go to a hearing without the injunction he asks, and if he has equities

The Board of Commissioners, etc., *vs* Hurd.

against the judgment they can be secured on that hearing. There was no error in the refusal of the Court to grant the injunction.

Judgment affirmed.

THE BOARD OF COMMISSIONERS OF ROADS AND REVENUES
FOR THE COUNTY OF FLOYD, plaintiff in error, *vs*. WILLIAM S. HURD, defendant in error.

1. A non-resident plaintiff may, by complying with the provisions of the Act of Congress of March 2d, 1867, remove his case from a State tribunal to the next term of the Circuit Court of the United States to be held in the district in which said suit is pending, and this motion may be made at a term of the Court prior to that which said suit is returnable.
2. A county being suable by law in the State tribunals, is, though a portion of the State, subject to suit in the United States Courts.
3. Suits may properly be removed from a State Court into the Circuit Court of the United States, where the jurisdiction of the Circuit Court, if the suit had been originally commenced there, could not have been sustained.

Removal of cases. United States Courts. Jurisdiction. Before Judge McCUTCHEM. Floyd Superior Court. July Adjourned Term, 1872.

For the facts of this case, see the decision.

WRIGHT & FEATHERSTON ; ALEXANDER & WRIGHT, for plaintiff in error, argued as follows :

The motion was prematurely made, because the term of the Court had not arrived to which the case was returnable.

As to this motion, therefore, the whole proceeding was had at Chambers, and the Judge who heard the motion and granted the order was not sitting as a Court.

Judges cannot exercise any power out of term time except the authority is expressly granted ; but they may, by order granted in term time, render a judgment in vacation : New

Code, 249; 1 Kelly, 300, *Watson vs. Jones*; 37 Ga., 251, *Solomon vs. Peters*; 24 Ga., 418, *Brown et al., vs. Smith*; 45 Ga., 300, *Beall vs. Bailey*. Could defendants have originated any motion themselves, as, for instance, a motion to dismiss for any reason in vacation, or even during a session which was being held before the return term of the case? They could not. If this be true, how can the plaintiffs originate a motion and have it heard under such circumstances? The defendants were not in Court, and could not be considered in till the return term had arrived. The laws of this State give to the Judge certain powers which he can exercise in vacation, but he can exercise no others. The power to remove a cause must be exercised by the Court having jurisdiction. The July term, 1872, of the Superior Court has no jurisdiction of a case returnable to the January term, 1873: Act of Congress, March, 1867; 40 Ga., 1, *Stewart & Cutts, vs. Mordecai*; 41 Ga., 242, *Peters et al., vs. Peters*. This Court has frequently passed upon the legal questions of removal—in some cases affirming and in others reversing the judgment of the Court below. In doing so, it has construed the laws of Congress as well as State laws in reference to the questions: 23 Ga., 480; 40 Ga., 1; 41 Ga., 417; 43 Ga., 142, 181; 45 Ga., 104; *Mayor and Council of Macon vs. Cumming*, July term, 1872; *Sindell vs. McWilliams*, *Ibid.*

The State of Georgia cannot be sued in the Federal Court, nor can she be sued in the State Court unless by special statute. If the statute authorizes a suit in the State Court, the suit must be confined to the State Court; and, being sued in the State Court, will not justify a removal to the Federal Court. Floyd county is a part of the State, and for the same reason cannot be sued in the Federal Court, nor be sued in the State Court without express authority of the Legislature, and this grant is limited and confined to the State Courts entirely. The Legislature of Georgia can confer no power on the Federal Court.

HILLYER & BROTHER; L. E. BLECKLEY, for defendant, submitted the following brief:

1st. Case removable at *any time*: Act of Congress, March, 1867, page 558.

2d. County non-suable as a corporation: Code of 1873, section 491. If a corporation, then it is a citizen, within the Act of 1867. As to removal: 12 Wallace, 270; 14 Wallace, 282.

3d. The suit is proper for purpose of settling all possible controversy as to the validity and amount of the debt, and to exhaust the property specially made liable by the Act authorizing the county to issue the bonds: Act of 1853-4, page 400.

WARNER, Chief Justice.

On the 5th day of July, 1872, the plaintiff, a citizen of the State of Connecticut, commenced his action in the Superior Court of Floyd county against said county of Floyd, and five other persons, alleged to be commissioners of roads and revenues for said county, to recover the sum of \$16,650 00, besides interest, due him on certain bonds of said county. The suit was commenced in July, 1872, but too late to be returned to the July term of the Court in 1872, and was returned to the next January term, 1873. The July term of the Court was adjourned, and during the session of said adjourned Court, on the 13th of January, 1873, but before the regular term of the Court to which the plaintiff's suit was made returnable on the 20th of January, 1873, the plaintiff petitioned the Court to remove his case pending in the Superior Court of Floyd county, as aforesaid, to the Circuit Court of the United States for the Northern District of Georgia, alleging that he was a citizen of the State of Connecticut, and the defendant a citizen of the State of Georgia, and that he had reason to believe, and did believe that from local influence he would not be able to obtain justice in said State Court. The petition was accompanied by the affidavit and bond of the petitioner, as required by the Act of Congress, of 2d of March,

1867, providing for the removal of cases from State Courts to the Circuit Courts of the United States. The Court passed an order that the bond and security be accepted, and that the Court proceed no further in said suit, and that the clerk make out and deliver to the plaintiff a transcript of the record, proceedings, etc. Whereupon the defendant excepted.

1. By the amendatory Act of Congress, of the 2d March, 1867, it is enacted, "that where a suit is now pending or may be hereafter brought in any State Court in which there is controversy between a citizen of the State in which the suit is brought, and a citizen of another State, and the matter in dispute exceeds the sum of \$500 00, exclusive of costs, such citizen of another State, whether he be plaintiff or defendant, if he will make and file in such State Court an affidavit stating that he has reason to, and does believe, that from prejudice or local influence he will not be able to obtain justice in such State Court, may, *at any time*, before the final hearing or trial of the suit, file a petition in such State Court for the removal of the suit into the next Circuit Court of the United States to be held in the district where the suit is pending, and offer good and sufficient surety for his entering in such Court, on the first day of its session, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and doing such other appropriate acts as by the Act to which this Act is amendatory, are required to be done upon the removal of the suit into the United States Court, and it shall be, thereupon, the duty of the State Court to accept the security, and proceed no further in the suit, and the said copies being entered as aforesaid in such Court of the United States, the suit shall there proceed in the same manner as if it had been brought there by original process." There is no complaint that the plaintiff has not complied with the provisions of this Act of Congress as to the removal of cases pending in the State Courts to the Circuit Courts of the United States, but the complaint is that the application for removal was prematurely made to the State Court, inasmuch as it was made to the Court before the session thereof to which the suit was made

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returnable, and because the Circuit Court of the United States has no jurisdiction of the case, that the State could not be sued in that Court, and the county of Floyd is a part of the State. The plaintiff's action is brought against the defendant for an alleged violation of a contract, and the law gives to him a remedy to enforce it by an action or suit at law: Code, 2217. Ordinary suits in the Superior Court shall be by petition to the Court, signed by the plaintiff or his counsel, plainly, fully and distinctly setting forth his charge or demand, substantially: Code, section 3256. When such petition is filed in the clerk's office of the Court, his indorsement thereon of the date of its filing in office shall be considered the time of the commencement of the suit: Code, sec. 2257. The plaintiff's petition against the defendant was filed in the clerk's office on the 5th day of July, 1872, and the suit was commenced on that day by the plaintiff against the defendant, and was pending in the Superior Court of Floyd county, within the terms and meaning of the Act of Congress. The application for removal was made to the Superior Court of that county when in session, according to law, but before the January term of the Court to which the suit was made returnable; the suit, however, was pending in that Court, nevertheless, and the Court, when lawfully in session, had the legal power and authority to hear and consider the application for its removal at the time when the same was made and allowed. The plaintiff may have believed that, from local influence he would not be able to obtain justice at the first term of the Court, that his case would be dismissed on demurrer, or for non-payment of taxes, or for some other cause produced by local influence, and for that reason desired to exercise his right of removal before the first term of the Court. The suit was commenced and pending in the Superior Court of Floyd county, and under the provisions of the Act of Congress, he had the right, *at any time* before the final hearing or trial of the suit, to petition the Court for its removal, and upon a compliance with the provisions of the Act for that purpose, it was the duty of the Court to grant the application

and proceed no further with the suit. It is as much the duty of the State Courts to obey the Constitution of the United States, and the Acts of Congress passed in *pursuance thereof*, as any other law—indeed, it is the supreme law of the land, and so expressly declared to be by the Constitution of the United States, and by the Constitution of this State. The Act of Congress, of the 2d March, 1867, has been decided by the Supreme Court of the United States to be a valid, constitutional law: *Railway Company vs. Whitton*, 13 Wallace Reports, 271.

2. It is true that the county of Floyd is a part of the State of Georgia, but it is also true that the State has, in the exercise of her sovereign authority, declared it to be a corporation, with power to sue or *be sued* in any Court—that is to say, in any Court of this State: Code, sec. 525. The State has given her consent that the county of Floyd may be sued as a corporation in any of the Courts of this State, and this privilege is not restricted to her own citizens, even if she could have done so under that provision of the Constitution of the United States which declares, “that the citizens of *each State* shall be entitled to *all privileges* and immunities of citizens in the several States.” It has been repeatedly held by the Supreme Court of the United States that a corporation is a citizen for the purpose of giving to the Federal Courts jurisdiction: See *Railway Company vs. Whitton*, before cited, 13 Wallace, 290. The plaintiff, although a citizen of another State, had the right to sue the county of Floyd as a corporation, by the express assent of the State, in her Courts. This being so, then the Act of Congress before recited, which has been decided to be a valid, constitutional law, provides for the removal of the suit into the Circuit Court of the United States, for the causes and in the manner therein specified.

3. In the case of the *City of Lexington vs. Butler*, 14 Wallace’s Reports, 293, Mr. Justice CLIFFORD, in delivering the opinion of the Court, says: “Suits may properly be removed from a State Court into the Circuit Court, in cases where the jurisdiction of the Circuit Court, if the suit had been originally

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commenced there, could not have been sustained." Whether the plaintiff has a good cause of action against the defendant, or whether he can recover or obtain a judgment on the final trial of the case, was not the question for the Court below to decide, and it did not decide it. The only question made for the decision of the Court below was the right of the plaintiff to remove his case, commenced and pending against the defendant in that Court, to the Circuit Court of the United States, as provided by the Act of Congress of 1867. That was the only question decided, and that is the only question which this Court can review and decide.

Let the judgment of the Court below be affirmed.

JOHN F. PETTY, plaintiff in error, vs. ELIZABETH KENNON,
defendant in error.

Where the terms of a parol contract for the rent of land were, that the tenant should pay a certain portion of the crops for rent, "that he should repair the fences around the cleared land, and the landlord was to pay him for it, that he was to stay on the place one, two, three, four or five years, if both parties were willing, and at all events until he should get pay for the work done on it," and the tenant did repair the fences, and paid the rent, except of the cotton, which he retained, the landlord still owing upwards of \$40 00 after allowing for the rent cotton, for work done in repairs :

Held, There was such a performance of the contract by the tenant, that the landlord could not, on the expiration of the first year, treat him as a tenant at will, so as, on a notice to quit, without payment, or tender of what was due for repairs, to be entitled to a warrant to dispossess him as a tenant holding over.

Landlord and tenant. Statute of frauds. Part performance. Before Judge HARVEY. Haralson Superior Court. March Term, 1873.

On June 24th, 1871; Elizabeth Kennon instituted proceedings against John F. Petty as a tenant holding over, to recover the possession of a certain tract of land situate in the

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county of Haralson. The defendant filed his counter-affidavit to the effect that the term for which he had rented said lot of land had not yet expired. When the issue thus formed came on for trial the evidence presented the following case :

In the fall of 1869, the plaintiff contracted with the defendant to the effect that he was to go on the land in controversy, repair the fences around the cleared ground, for which labor he was to be paid, to plant in wheat, corn and cotton, and pay as rent one-third of the corn and one-fourth of the cotton and wheat. He was to place all necessary repairs on the farm, and stay on the place one, two, three, four or five years, if both parties were willing, and at all events until he should be paid for all the work done. He was to have all he made on any part of the land which he might clear himself. He was to reclaim as much of what had been once cleared and turned out as he saw proper.

In the fall of 1870 the defendant paid to the plaintiff her portion of the corn and wheat, but did not deliver to her any of the cotton, of which there was but little made. The portion which was retained went towards paying him for the repairing, etc., done, leaving the plaintiff in his debt still some \$40 00 or \$50 00 for services. The evidence was conclusive as to the services performed by the defendant, and as to the plaintiff's being still in his debt.

The plaintiff became dissatisfied with the defendant for tearing down and removing one of the houses, and in December, 1870, gave him verbal notice to leave the place, and on February 8th, 1871, a written notice to the same effect was delivered to him.

The Judge charged the jury as follows : "That if they believed from the evidence that the defendant was to remain in possession of the premises, under the contract, until he should be fully remunerated by the use or rents, for the labor done on the premises, and that he had not been so remunerated at the time the warrant was sued out, then the plaintiff could not recover, and the jury must find for the defendant ; that it was competent for the parties to make such a contract ; that

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if they believed the tenancy, under the contract, was for a longer period than one year, it was, in law, a tenancy at will, in which case a two months' notice to quit, by the landlord, must be given, and that must be given when the tenant has no crops growing on the land, or must expire after a sufficient time for the maturing and gathering of the crops growing at the time of the notice."

The jury returned a verdict for the plaintiff for the premises in dispute and \$150 00 rent.

The defendant moved for a new trial, because said verdict was contrary to the evidence and the charge of the Court. The motion was overruled, and the defendant excepted.

W. J. HEAD; J. A. BLANCE, by JOHN MILLEDGE, for plaintiff in error.

THOMPSON & TURNER, by E. N. BROYLES, for defendant.

TRIPPE, Judge.

It is not denied that at the time the warrant was issued against the tenant, the landlord was indebted to him \$40 00 for repairs of fences, under the contract for rent, and that the tenant was to keep the farm until he was paid. If the tenant had made a parol contract for a tenancy of two or three years for a stipulated sum, and had paid the price and gone into the possession, would it not have been such performance of the contract, that it would have been good under the statute of frauds, or section 1951 of the New Code? A parol license of an easement, though under the general rule revocable, is not always so, and the exception is: where acts have been done by one party upon the faith of a license given by another, the latter will be estopped from revoking it to the injury of the former: *Sheffield et al., vs. Collier*, 3 Kelly, 83. A specific performance of a parol contract whereby the title to land is conveyed, will be decreed in many cases. The same principle will prevent a landlord, who has made a contract with a tenant to hold possession for a term, or until he

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is reimbursed for improvements, and who, under the contract, has expended money and labor beyond the rent for the first year, from claiming at the end of that year, that it is a tenancy at will, and from summarily ousting the tenant without even a tender of what the landlord's own witnesses prove was due the tenant. The Court charged the jury in accordance with this principle, and should have granted a new trial, because the verdict is in violation of it. The case was to be decided according to the right of the landlord to sue out the warrant at the time it was issued.

Judgment reversed.

W. A. RANSOM & COMPANY, plaintiffs in error, vs. E. B. LOYLESS & COMPANY, defendants in error.

1. Where, after the dissolution of a firm, new notes are given by one of the partners in the firm name, the evidence should be clear and satisfactory of the notice of such dissolution to the creditor accepting such notes, to discharge the other partner.
2. Where a firm is sued on notes, and one of the partners pleads *non est factum*, the other making no defense, the evidence being conclusive that the notes were signed by him, a verdict for the defendants is contrary to law.

Partnership. Dissolution. Verdict. Notice. Before Judge STROZIER. Terrell Superior Court. May Term, 1873.

For the facts of the case, see the decision.

WOOTEN & HOYLE, for plaintiffs in error.

F. M. HARPER, by RICHARD H. CLARK, for defendants.

WARNER, Chief Justice.

This was an action brought by the plaintiffs against the defendants, as partners, on two promissory notes, for the sum of \$1,271 00, signed E. B. Loyless & Company. Loyless

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filed a plea of *non est factum*, alleging that the notes were signed after the dissolution of the partnership, and without his authority. There was, also, a count in the plaintiff's declaration, for goods sold and delivered to the defendants, as partners, before the dissolution of the partnership, for which it was alleged the two notes were given. On the trial of the case, the jury found a verdict for the defendants. A motion was made for a new trial on the ground that the verdict was contrary to the evidence, and without evidence to sustain it, and because the verdict was contrary to law, which was overruled and the plaintiffs excepted.

1. It appears from the evidence in the record, that Loyless & Peeples were partners, doing business in the name of E. B. Loyless & Company; that in the year 1867, they purchased a bill of goods of the plaintiffs, in New York, for which two notes were given. In January, 1868, the partnership was dissolved. After the two notes given for the goods became due, and after the dissolution of the partnership, to-wit: on the 28th of September, 1868, the two notes now sued on were made, and time of payment extended, for and in the place of the two notes originally given for the goods. The firm name of E. B. Loyless & Company, was signed by Peeples, one of the partners, to the last named notes. There was no evidence that the plaintiffs knew of the dissolution of the partnership of E. B. Loyless & Company, at the time the partnership name was signed to the notes by Peeples, in New York, except what was contained in the paper signed by Root, the plaintiffs, and some of the other creditors of Loyless & Company for an extension of time; that paper is dated 7th of April, 1868, in which Mr. Root states that Mr. Peeples, representing Messrs E. B. Loyless & Company, owes about \$16,000 00, all in New York city; has good assets to the amount of \$30,000 00; that he, Root, is the principal creditor—\$5,500 00; that his debt is secured, and could enforce its collection, but having entire faith in Mr. Peeples, and in his manager, he is willing to wait upon him on condition that his other creditors will do likewise—Mr. Peeples pledging him-

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self that he will use all possible diligence in collecting his debts, and selling only for cash. In order to bring home knowledge of the dissolution of the partnership of E. B. Loyless & Company to the plaintiffs, who had been dealing with them as partners at the time the notes were signed by Peeples in the partnership name, the evidence should be clear and satisfactory. In our judgment, there was not sufficient evidence, under the law in this case, to charge the plaintiffs with a knowledge of the dissolution of the partnership at the time the notes were executed by Peeples, one of the partners, in the firm name, to discharge the other partner. It is a significant fact that Peeples, who was present when the notes were executed, and who was examined as a witness at the trial, did not state anything about the plaintiffs' knowledge of the dissolution of the partnership. Why did not the defendants prove it by him, if the plaintiffs had such knowledge at the time the notes were signed by him?

2. The verdict was contrary to law, because the jury found in favor of both defendants, Peeples not having made any defense to the action.

Let the judgment of the Court below be reversed.

H. H. PENNY, plaintiff in error, vs. WILLIAM VINCENT,
defendant in error.

There being nothing in the record showing that the case was not fairly submitted to the jury, and as the verdict was to be determined according to the credit they might give to the testimony of a witness who was a party to the suit, this Court will not interfere by setting aside the verdict, especially as it does not appear that the jury abused their right in the premises as to the credibility of the witness, under the circumstances exhibited in the record. Under the Act of December 15th, 1866, juries have a larger discretion as to the credit they will give such witnesses, than in the case of witnesses who are not parties.

New trial. Witness. Before Judge HARVEY. Floyd
Superior Court. January Term, 1873.

Penny sued out an attachment against Vincent for \$210 00, upon the ground that he resided beyond the limits of the State. A levy was made upon certain groceries as the property of the defendant. The declaration alleged that the defendant was indebted in the aforesaid amount to plaintiff, for money and goods which said plaintiff let William Shropshire, the defendant's son-in-law, have, at the special instance and request of said defendant, and which he promised to pay for before they were delivered to the said Shropshire. Reference was made to a bill of particulars to the declaration attached. Annexed to the declaration were these words: "The amount of the debt is shown by the notes in the above case, of which the following are copies."

The notes were dated March 17th, 1869, signed by William Shropshire, each for \$105 00, payable to Penny or bearer, sixty and ninety days after date, respectively. Then followed the bill of particulars, showing an existing indebtedness of \$210 00, headed as follows:

"William Vincent, in account with H. H. Penny."

The defendant appeared and pleaded the general issue.

The plaintiff testified on the trial as follows: On March 17th, 1869, he was the owner of a small family grocery store in the city of Rome. His clerk was William Shropshire, the son-in-law of the defendant. Shropshire wished to buy the stock of groceries, but plaintiff was unwilling to sell to him. The defendant then came to plaintiff and stated that he desired to set his son-in-law up in business, and to give him a start; that he would buy the stock if plaintiff would take one-third cash and the balance in two payments, with interest. Plaintiff accordingly sold to him. The stock amounted to \$315 00; one-third was paid in cash, to-wit: \$105 00, which left \$210 00 due.

Plaintiff took two notes from Shropshire, each for \$105 00, in discharge of the debt. He took the notes at the defendant's request, without intending to release him. He did not sell the stock to Shropshire, and would not have credited

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him for them, but sold them to defendant, and the taking of the notes was for his accommodation. It was understood that the defendant was not to be released but was to be still liable on the original purchase. Plaintiff did not make out any inventory or bill of the goods at the time of the sale. Since this suit he made out a bill of the goods, but did not charge them to anybody. His attorneys added the heading, which appears on the bill of particulars, to the declaration attached.

J. C. Wood testified, that some short time after the sale above referred to, he saw the defendant in the store selling goods; that he made some tin work, which was placed in said store for sale, and sold it to defendant.

The jury returned a verdict for the defendant. The plaintiff moved for a new trial because the verdict was contrary to the evidence. The motion was overruled and he excepted.

UNDERWOOD & ROWELL, for plaintiff in error.

PRINTUP & FOUCHE, for defendant.

TRIPPE, Judge.

The case was fairly submitted to the jury. No complaint is made of the action of the Court in the progress of the trial, and the verdict was to be determined according to the credit the jury might give to the witness who was a party to the action.

The preamble to the Act of 15th December, 1866, which opens wide the door to almost every person as a witness, recites that "the persons (the jury) who are to decide upon them, *should exercise their judgment on the credit of the witnesses* adduced, for the truth of their testimony." In *Laramore et al. vs. Minish et al.*, 43 Georgia, 282, (see on page 287,) this Court held that "under a proper construction of this law, witnesses introduced under its provisions are lifted out of the general rule, and the jury may exercise their judgment on the credit of such witnesses from the fact of their in-

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terest, irrespective of other impeachment or attack." With all this power, a jury should not capriciously discredit a witness or reject his testimony; but, if there be in evidence any circumstances or facts in conflict with the testimony of a party to the suit, such as the fact of the notes, as in this case, being executed solely by Shropshire—the suing out of the attachment *on the notes*, the manner of making out the account—and the point be directly made to the jury as to what credit shall be given to his testimony, and they deliberately decide to reject it, and the Judge trying the case, who, with the jury, both see and hear the party testifying, refuses to interfere, we do not think a case is made to demand our intervention.

Judgment affirmed.

MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH,
 plaintiff in error, vs. WILSON & GIBSON, defendants in
 error.

1. By the original charter of the city of Savannah, the streets of the city could not be granted for any purpose, except by Act of the General Assembly; it was not competent, therefore, for the Mayor and Aldermen to authorize the erection of a market house in St. Julian street, even temporarily, if it deprived any of the inhabitants of said street of the use and enjoyment thereof.
2. All acts of a municipal corporation beyond the scope of the powers granted to it are void.

Municipal corporations. Savannah. Before Judge SCHLEY.
 Chatham Superior Court. January Term, 1873.

For the facts of this case, see the decision.

W. B. FLEMMING, for plaintiff in error.

R. E. LESTER; HARTRIDGE & CHISOLM, for defendants.

WARNER, Chief Justice.

This was an action brought by the plaintiffs against the defendant, to recover damages for the injury done them by

the erection of certain buildings and obstructions in St. Julian street, in the city of Savannah.

On the trial, the jury, under the charge of the Court, found a verdict in favor of the plaintiffs for \$2,000 00. The defendant made a motion for a new trial, which was overruled, and the defendant excepted. There is no brief of the evidence in the record containing the facts of the case. There is an agreement of counsel, however, that the evidence at the trial proved damage to the plaintiffs, and no exception was taken to the verdict. It was further agreed, that a temporary market was erected by the defendant in the middle of the street, with a space of twelve feet on each side between the market and curb-stone of the pavement.

The error complained of is, that the Court erred in charging the jury that the defendant, as a corporation, had no power or authority to build a *temporary* market in St. Julian street without first obtaining from the General Assembly of the State special authority to do so. The presiding Judge certifies that he charged the jury that the defendant had no legal right to erect a market-shed in St. Julian street, to the detriment of the citizens, unless the power was given to the corporation by an Act of the Legislature; that the street being a public highway, each citizen dwelling thereon had a public right to the use and easement thereto attaching; that right and easement could not be divested by an ordinance of the City Council, but must be done by the authority of the Legislature, and if the use of St. Julian street should be so perverted or obstructed as to cause damage to the plaintiffs by the erecting of the shed, then the defendant is responsible for such damage as the plaintiffs have proven to result to them from this obstruction illegally made. There is nothing said in the Judge's charge about the erection of a temporary market by the defendant.

It may be stated as a sound legal proposition, that a municipal corporation in this State derives its power and authority from the Act of the General Assembly which creates it—that

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is its organic law, and it can do no act *forbidden* by that organic law.

By the original charter of the city of Savannah, the squares, streets, lanes and passages described in the plan of said town in the Surveyor General's office, and have been accustomed or made use of by the inhabitants of said town, shall be, and continue, the common property of the inhabitants of said town, and shall not be aliened or granted away for any purpose whatsoever, than by an Act of the General Assembly. (See the original charter of the city, granted 1st of May, 1760.) It was not competent, therefore, for the defendant to grant or authorize the erection of a market-house in St. Julian street, in said city, even temporarily, if it deprived any of the inhabitants of said street from the use and enjoyment thereof, without an Act of the General Assembly for that purpose, for the plain reason that the organic law of the corporation forbids it.

It is insisted that the market house was only erected temporarily in that street whilst the defendant was pulling down the old and erecting a new permanent market house on the site appropriated for that permanent building. The reply is, that the organic law forbids the defendant from granting away the streets of the city, for any purpose whatsoever, without an Act of the General Assembly. It is a question of power in the defendant as a municipal corporation. It has no more power under its organic law to grant away the use of the streets of the city for the erection of a temporary market house, or for any other purpose, than it would have to grant away the use of the streets permanently. It had no power to grant away the use of the street for *any purpose whatsoever*, so as to deprive the inhabitants of its common use.

The necessity of the case can make no difference as to the power of the defendant; for if it did, the defendant could create the necessity and plead that as its justification for doing what its organic law forbids it to do, for any purpose whatsoever, without the authority of the General Assembly. All acts of a municipal corporation beyond the scope of the powers

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granted to it are void; much more are its acts void when expressly *forbidden* by its organic law.

A municipal corporation cannot be justified or excused on the plea of necessity for the exercise of powers which have not been granted to it; much less can it be justified or excused on the plea of necessity for the exercise of powers which its charter expressly forbids.

Let the judgment of the Court below be affirmed.

JOSEPH HUDSON, administrator, for use, etc., plaintiff in error, vs. JOSEPH T. SPENCE, defendant in error.

When the maker of a note, dated in 1863, pleads, that the same was payable in Confederate currency, and the only evidence on the trial is the date of the note, and that the consideration expressed therein was cotton in the gin-house of the payee, and his growing crop of cotton, the defendant being a competent witness, although the payee is dead, his evidence is the best evidence which exists of the fact sought to be proved, and should be produced.

Scaling Ordinance. Witness. Before Judge KIDDOO. Mitchell Superior Court. May Term, 1873.

Joseph Hudson, as administrator upon the estate of David Hudson, deceased, for the use of Simeon Beck, brought complaint against Joseph T. Spence upon the following note:

"On the 25th day of December next, I promise to pay David Hudson, one thousand dollars for cotton now in the gin-house of said Hudson, and his crop of the present year, to be picked and placed in gin-house. August 10th, 1863.

(Signed)

"JOSEPH T. SPENCE."

The defendant pleaded as follows: 1st. The general issue. 2d. That it was the understanding between the parties to said note that it was to be paid in Confederate money, and that he tendered payment in said currency. 3d. That David

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Hudson failed to place in said gin-house his cotton crop for the year 1863, according to the terms of said note.

The plaintiff, Simeon Beck, testified that he purchased the note sued on from David Hudson prior to his death and before it matured, giving therefor \$1,000 00 in Confederate money; that in the year 1864, defendant offered to pay off said note in Confederate money, but he refused to take it; that defendant offered him \$1,500 00 in Confederate money for the note; that defendant did not state that he did not get the cotton for which the note was given; that Marion Collins did not offer to him the money for the note, though they had some conversation about it.

Marion Collins testified that the defendant, in 1864, got him to see plaintiff to try and get up his note for \$1,000 00; that defendant had himself endeavored to induce plaintiff to take the money, but had failed; that he agreed to pay witness \$100 00 if he could induce the plaintiff to accept the Confederate money; that witness made the effort, but failed.

James Spence testified that about January 1st, 1864, a few days after the note fell due, plaintiff came to defendant's house, and witness heard a conversation between them as to the note; that defendant stated that the note was to be paid in Confederate currency, at the same time tendering it to plaintiff; that plaintiff refused to accept it; that from January 1st, 1863, the defendant had always on hand large amounts of Confederate money, and in this way lost largely at the surrender of the Confederate armies.

W. A. Byrd testified that in 1866 cotton sold in Mitchell county for forty-eight cents per pound.

It was admitted that \$1 00 in gold was worth, at the date of the note, \$15 00 in Confederate money, and at the maturity thereof, \$20 00.

The jury found for the plaintiff \$133 33, without interest. The plaintiff moved for a new trial, because said verdict was contrary to the law and the evidence. The motion was overruled, and the plaintiff excepted.

VASON & DAVIS; W. A. BYRD, for plaintiff in error.

JAMES H. SPENCE; W. E. SMITH; LYON & IRVIN, for defendant.

TRIPPE, Judge.

The note was executed in August, 1863, payable the ensuing December. It was therein expressed to be given for the cotton in the gin-house of the payee, and his then growing crop. The payee was dead, and the suit was in the name of plaintiff, as bearer. Defendant pleaded the Scaling Ordinance of 1865. There was no evidence at the trial showing what the cotton was worth, or that the note was to be paid in Confederate money. The jury scaled the note from \$1,000 00 to \$133 33, and gave a verdict for the latter amount. It was urged that the date of the note was sufficient evidence to show the currency in which it was to be paid. We are not prepared so to hold, at least under the facts as they exist in this case. There was better evidence of that fact, if it were true, than the presumption furnished by the date of the note, if, indeed, such a presumption could spring from the date. The defendant knew the truth of the matter. He was a competent witness, notwithstanding the death of the payee: *Horne et al. vs. Young et al.*, 40 *Georgia*, 193. The Act of December 18th, 1866, touching the competency of parties as witnesses in such cases, was passed three days after the General Evidence Act. Section 3707, Revised Code, declares "the best evidence which exists of the fact sought to be proved must be produced, unless its absence is satisfactorily accounted for."

We think it best that a new trial should be had, and that the maker be required to testify to what he claims he has presumptively proven. We do not hold that the presumption did exist, nor do we pass either way upon that point. We simply mean that whether or not there was such a presumption, it was not sufficient in this case.

Judgment reversed.

Smith vs. The State of Georgia.

LEE SMITH, plaintiff in error, vs. THE STATE OF GEORGIA,
defendant in error.

- The killing of a human being, even in the heat of passion is murder, if the slayer have no just cause for his anger, or if after the provocation, and before the killing, there be sufficient time for passion to cool and reason to resume its sway.

Criminal law. Murder. Manslaughter. Before Judge CLARK. Webster Superior Court. March Term, 1873.

Lee Smith was placed on trial for the offense of murder, alleged to have been committed upon the person of Katy Smith, on June 24th, 1872. The defendant pleaded not guilty. The evidence made substantially the following case:

The homicide occurred in Webster county, at or about the time charged in the indictment. The deceased was the wife of the defendant. They had been married some two or three years. They had been living on bad terms until some two or three months before the homicide, when the deceased went to her mother's house, whether of her own accord or sent by the defendant, the evidence is conflicting. On the day of the killing, as the deceased was going to the new ground from her mother's house, about a quarter of a mile distant, the defendant stepped out of the woods and joined her. They commenced quarreling; the defendant "hunched" the deceased with his elbows and fists; deceased told him that he had better let her alone; defendant replied, that he was not bothering her; he then ran his hand in his pocket and drew out a pistol; deceased said that he had better not shoot her or she would cut his throat, at the same time running around her sister, Jane Wherry, asking her not to let the defendant shoot her; Jane Wherry wrapped her dress around the head of deceased, leaving but a small portion of her forehead visible; deceased again said to defendant that he had better not shoot her; he replied, "I will, God damn you; I am going to kill you;" the defendant shot her twice, first in the head and then in the abdomen. At the time the defendant was getting out his pistol

the deceased was drawing her knife; it was a "Barlow" knife, with a short blade. The deceased died from the shot received in the abdomen.

The defendant attempted to show that the deceased had been receiving improper attentions from one Ike Harper, but the evidence upon this point was so exceedingly slight that it is omitted. The defendant and Ike had a difficulty about one week before the homicide.

The jury found the defendant guilty. A motion was made for a new trial upon the following grounds:

1st. Because the Court erred in refusing to charge the jury as follows: "That if they believed, from the evidence, that the defendant, at the time of the killing, was engaged in a lawful act, and the killing resulted from want of discretion and circumspection, then he is guilty of involuntary manslaughter, in the commission of a lawful act without due caution and circumspection."

2d. Because the Court, after charging as follows, as requested: "That if the jury believed, from the evidence, that the defendant killed the deceased without malice, either express or implied, and without any mixture of deliberation whatever, and if they should believe that the deceased was the assailant, or other equivalent circumstances to justify the excitement of passion, then the defendant is guilty of voluntary manslaughter," committed error by adding the following: "You will observe that to make a case of voluntary manslaughter, the killing must be without malice, either express or implied, and without any mixture of deliberation whatever. It must have been done upon a sudden heat of passion. There must have been at the time some actual assault upon the prisoner or an attempt by the person killed to commit a serious personal injury. The killing must also be the result of that sudden, violent impulse of passion, supposed to be irresistible."

3d. Because the Court erred in charging the jury as follows: "That to make a case of voluntary manslaughter there must have been, at the time, some actual assault upon the de-

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fendant or an attempt, by the person killed, to commit a serious personal injury. The killing must also be the result of that sudden, violent impulse of passion, supposed to be irresistible. If, in the heat of passion, the prisoner killed his wife when she was making no actual assault upon him, nor attempting to commit any serious personal injury upon him, it cannot be a case of voluntary manslaughter, but must be a case of murder."

4th. Because the Court erred in charging the jury as follows: "If the defendant commenced a difficulty with the deceased by hunching and by sticking her, and she drew a 'barlow' knife and threatened to cut his throat, and made at him, and he drew a pistol, and she ran around her sister, and her sister protected her with her dress, and he shot her, of which wounds she died, he is guilty of murder, and it does not make any difference that she would not live with him. The fact that he suspected her of infidelity to him, does not mitigate the offense. The law does not allow life to be taken upon suspicion, but holds him, who lightly takes life upon suspicion, guilty of murder."

5th. Because the Court erred, after charging upon the subject of voluntary manslaughter, in the following addition: "But if the defendant was in a heat of passion, and was assaulting, or beating, or hunching her, and the assault she made upon him, if any, had ceased, and she ran for protection to her sister, and while being protected by her, he shot her, of which she died, it is murder."

6th. Because the verdict was contrary to and not authorized by the evidence.

The motion was overruled and the defendant excepted.

W. A. HAWKINS; G. H. PICKETT; J. R. McCLESKY, for plaintiff in error.

C. F. CRISP, Solicitor General, by PHIL. COOK; C. T. GOODE, for the State.

McCAY, Judge.

It is a mistake to suppose that if one kill another in the heat of passion, that such killing cannot be murder. Every man is responsible to the community for the control of his temper, and if for some small provocation he permits himself to get into a fury and kills a human being, it is murder. There must be provocation such as *justifies* the excitement of passion. Provocation by words, threats and contemptuous gestures, is, by the very terms of the Code, insufficient. So, also, if the passion be aroused for just cause, the law holds a man responsible for failing to grow calm in a reasonable time. If, after sufficient time for the voice of reason and humanity to be heard, the killing is done, it will be murder.

Under the facts of this case, we think the defendant was guilty of murder. The language of his wife was not sufficient to justify that sort of passion which the law calls heat of passion, supposed to be irresistible. And when she fled in terror to her sister, and cowered in fear behind her, it was the act of a fiend to take her life, in spite of her appeals for mercy. We are free to say, that we would have been better satisfied had the Judge kept more within his proper sphere in his charge. It is surely proper for the Judge to say to the jury, "if the proof satisfies your mind that such and such facts—narrating them—are true, then the defendant is guilty." This Court has never held that the jury, in a criminal case, are not judges of *the law* and the facts. We have said, and we say now, that a jury has not a right, under the laws of this State, to make law, or to construe and expound law. They are bound by the law, as it is written and given to them in charge by the Court. That is the means, and the only means, by which they are to find out what the law is, just as the evidence put before them, oral and written, is the only means by which they are to learn the facts. But when they have thus got the law from the Court and the facts from the witnesses, they are to *judge of them*, they are to say, What are the facts, according to the testimony? What is the law, according to the charge of the

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Court? They are then to judge of what the verdict ought to be, *considering* what the law is and what the facts are, and to find accordingly. The result of this application of the facts to the law is the exclusive province of the jury. The Judge, in his charge, should be careful not to infringe on this right. He should give them the law, in general terms, as suggested to him by the charge in the indictment and by the evidence, taking care not to usurp the province of the jury.

We do not intend, by these remarks, to lay down a positive rule. It is sometimes impossible to give the law intelligently except by reference hypothetically to such facts as make the crime. All we say is, that the charge ought to be given, in all cases, so as there shall not be any dictation by the Court to the jury. It is their prerogative to declare whether, under the law as given in charge, and under the evidence, they do or do not judge the defendant guilty.

Jndgment affirmed.

CHARLES B. LEITNER, plaintiff in error, vs. L. H. MILLER,
defendant in error.

1. Suit was brought against the maker and indorser of a promissory note, dated August 29th, 1866. The maker pleaded that the payee and indorser of the note was his wife at the time the note was executed, and had no separate estate. The indorser specially pleaded the same. The suit was discontinued as to the indorser. On demurrer, the plea of the maker was stricken by the Court:
Held, That this was not error, and that the husband was liable to the plaintiff, either as bearer, if the wife was not legally competent to make the indorsement, or as indorsee, if she was; and any defect as to the character in which he sued was amendable, and is cured by the verdict. And the more especially is the husband liable in this case, as the plea does not charge, nor was it offered to be proved, that the plaintiff had knowledge that the payee and indorser was a married woman, and it appears that he was the holder of the note before its maturity.
2. Although plaintiff's name may be on the back of the note sued on, he may recover against the maker, as the law will presume, in the absence of proof to the contrary, that an indorsement by him was never com-

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pleted by delivery, or if he had delivered it so indorsed, that he had taken it up, and was again the legal holder or indorsee.

Husband and wife. Promissory notes. Indorsement. Pleading. Presumption. Before Judge JOHNSON. Talbot Superior Court. March Term, 1873.

L. H. Miller brought complaint against Charles B. Leitner, as principal, and Sarah A. Leitner, as indorser, on the following note:

“\$150 00 MACON, GEORGIA, August 29th, 1866.

“Sixty days after date, I promise to pay S. A. Leitner, or bearer, one hundred and fifty dollars, at Nutting, Powell & Company’s office, in Macon Georgia. Value received. Interest from date. (Signed) “C. B. LEITNER.”

Indorsed.

“S. A. LEITNER.

“J. V. H. ALLEN, Treasurer.

“L. H. MILLER.

“Pay I. C. PLANT, or order, for collection.”

The defendant Sarah A. Leitner, pleaded that, at the date of the making of the note and of the indorsement on which she was sued, she was the wife of the defendant, Charles B. Leitner, and had no separate estate whatever.

The defendant, Charles B. Leitner, made the same defense. The case was discontinued as to Sarah A. Leitner. The plaintiff demurred to the plea of the remaining defendant. The demurrer was sustained and the defendant excepted. The case then went to the jury upon the plea of the general issue.

The plaintiff introduced his note, and testified that it came into his possession in September, 1866, before maturity; that he received it, with other papers, in settlement for goods sold the National Express Company; that he took it at its full face value, without any notice of any defect or any possible pretext for non-payment at maturity.

The plaintiff closed. The defendant moved for a non-suit

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on the ground that the plaintiff had shown title out of himself by his indorsement on the note sued on. The motion was overruled and the defendant excepted.

The defendant proposed to prove substantially the same facts as were set forth in his plea, which was stricken on demurrer. This the Court refused to allow and he excepted.

The jury found for the plaintiff. The defendant assigns error upon each of the aforesaid grounds of exception.

E. H. WORRILL; M. H. BLANDFORD, for plaintiff in error.

WILLIS & WILLIS, by HENRY L. BENNING, for defendant.

TRIPPE, Judge.

1. The note was executed in March, 1866, payable to Sarah A. Leitner, or bearer. It was indorsed in blank by S. A. Leitner. Both maker and indorser were sued, but the action was dismissed as to the indorser. If she was not legally competent to make the indorsement, then plaintiff's right of action as bearer was good, so far as the facts of the case show. It was not proven that the plaintiff knew that the payee was the wife of the maker, nor was it so pleaded, nor even that he knew she was a married woman, or that he knew the note was made for accommodation. Moreover, it appears that he was the holder of the note before its maturity. If there was any defect as to the character in which the plaintiff sued, to-wit: as indorsee, instead of bearer, it did not go to the merits, was amendable on motion and cured by the verdict.

2. Although the plaintiff's name was on the back of the note, the presumption is that an indorsement was not perfected by delivery, or that if it was, he had taken it up and was again the legal holder.

No right was claimed for the defendant below as to any equity or legal claim, growing out of the fact that the title was not in the plaintiff, and was in some other person.

Judgment affirmed.

CHARLES B. LEITNER *et al.*, plaintiffs in error, vs. L. H. MILLER, defendant in error.

Suit was brought against the maker and indorser of a promissory note, dated March, 1866. The maker filed a plea that she was a married woman when the note was executed and had no separate estate. The indorser pleaded the same, alleging that the maker was his wife, and that he was an accommodation indorser. The Court, on demurrer, struck the plea of the indorser. Neither plea alleged notice to plaintiff, who obtained the note before maturity from a prior indorser. No evidence was introduced or tendered to prove the facts alleged in the maker's plea, and there was a verdict against both defendants:

Held, There was no error.

Promissory notes. Indorsement. Before Judge JOHNSON. Talbot Superior Court. March Term, 1873.

L. H. Miller brought complaint against Sarah A. Leitner, as principal, and Charles B. Leitner, as indorser, on a note made August 29th, 1866, due at sixty days, for \$100 00, payable to C. B. Leitner, or bearer, indorsed by C. B. Leitner, J. V. H. Allen, treasurer, and L. H. Miller.

The indorser pleaded the general issue, and that the maker was, at the date of the making of the note, a married woman, his wife, and had no separate estate, and that he signed simply for her accommodation, being in no way interested in the consideration thereof.

The maker pleaded that at the time of the execution of the note, she was the wife of Charles B. Leitner, the indorser, and had no separate estate.

On demurrer, the second plea of the indorser was stricken, and he excepted.

The plaintiff introduced his note in evidence, and testified that he came in possession of it in September, 1866, before maturity, for a valuable consideration, and without any notice of any defense, or pretext for the non-payment of the same.

Plaintiff closed. Defendants moved for a non-suit upon the ground that the plaintiff had shown title out of himself by his indorsement on the back of the note. The motion was overruled and the defendants excepted.

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The jury found for the plaintiff against both defendants. The defendants assign error upon each of the aforesaid grounds of exception.

E. H. WORRILL; M. H. BLANDFORD, for plaintiffs in error.

WILLIS & WILLIS, by HENRY L. BENNING, for defendant.

TRIPPE, Judge.

No motion was made to strike the plea of the maker, Sarah A. Leitner. The plea of the indorser, C. B. Leitner, was demurred to, and the demurrer sustained. That plea was, that the maker was the wife of the indorser, had no separate estate, and that he was an accommodation indorser. Neither plea alleged notice of any of these facts to plaintiff, who obtained the note before maturity. There was no evidence introduced or tendered, to prove that the maker was a married woman, and the judgment was legally rendered against her. It is possible there may be some mistake or error in the record. But neither the bill of exceptions or the record show that any such testimony was introduced or rejected by the Court.

The Court was right in striking the plea of the husband. It charged no notice on plaintiff of any of the facts alleged. The *bona fide* holder, for value, is protected against any defenses set up by the maker, acceptor or indorser, except, 1st. *Non est factum*. 2d. Gambling or immoral and illegal consideration. 3d. Fraud in the procurement: New Code, sec. 2785. And the holder is presumed to be *bona fide*, and such a presumption must be negatived: New Code, sec. 2787.

If a person were to indorse a forged note, or the note of a minor, etc., he would be bound by his indorsement in the hands of a *bona fide* holder for value. Does the fact that he has indorsed the note drawn by his wife, when the note so indorsed is in the hands of a second indorsee, and who is a *bona fide* holder, constitute a defense against his liability? It is

not necessary to say it would not, as against his own indorsee, for that is not the case. But if the husband procure his wife to draw a note, then indorses it and puts it in circulation, it would be difficult to find reason or authority to discharge him. It is proper to observe that this note was executed prior to the passage of the Act of 1866, in relation to the rights of married women.

Judgment affirmed.

JULIEN RANSONE, plaintiff in error, vs. HOPE H. CHRISTIAN, defendant in error.

1. When, in an action for damages for the publication of a libel, the defendant pleaded justification :

Held, That, under the law of this State, (Code of 1873, section 3051,) this admitted not only the publication, but the manner of it, as charged in the declaration.

2. Whilst this Court will be slow to interfere with the verdict of a jury in a libel case, on the ground that the damages are excessive, yet, in such cases, it will look closely into the rulings of the Court, and if there be errors which may have influenced the jury in the amount of their verdict, a new trial will be granted.

3. It is only in actions of *tort*, and where there are circumstances of aggravation, that a jury is authorized to give punitive damages, and whether such circumstances do, in fact, exist, is a question for the jury, and not for the Court, to decide.

4. If, in an action for a libel, the defendant pleaded justification, and failed to make out his plea, the plea itself is a circumstance which the jury may, in fixing the amount of damages, consider as aggravating the *tort*, but the jury is not bound, in all cases, to consider it; on the contrary, if the defendant show strong grounds in support of the charge he has made, though he does not fully support his plea, the jury may, if it see fit, consider these grounds as mitigating circumstances, and reduce the damages accordingly.

5. It is error in the Court to exclude circumstances going to show that the plea of justification is true, as when a defendant undertook to show that the plaintiff was guilty of perjury in swearing that the contents of a certain bond represented the truth of a certain contract between himself and another, and the Court ruled out certain acts and sayings of

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the plaintiff, inconsistent with the provisions of the bond, as they appeared on its face.

6. In this State, as provided by section 3261, Code of 1873, the defendant, in an action *ex delicto*, may plead, as a defense, any claim he may have against the plaintiff, which arises *ex delicto*.

Libel. Justification. Damages. Evidence. Recoupment. Before Judge HARRELL. Early Superior Court. October Term, 1872.

Christian brought case against Ransone for \$25,000 00 damages, alleged to have been sustained by the plaintiff by reason of the following libelous publication by the defendant:

“OAKLAND, May 29th, 1871.

“*Dr. Hope H. Christian*: I have not before this pursued the course I now adopt, because a misconstruction of my motives might have prejudiced some member of the jury in your favor. During the term of the Superior Court held in Blakely, April, 1870, where, in a set speech made to a jury of your neighbors by Judge Clarke, you were pronounced a perjurer. You, employing the Ransy Sniffle of the town as a ‘go-between,’ demanded and received from Clarke a retraction. Since that time, the gang with which you prowl, by open declaration as well as by innuendo, no doubt with your sanction, and very probably at your suggestion, have magnified your valor and chuckled at your successful swaggering. That you should have nerved yourself to the point of defying a minister of the church—women and children having done your fighting during a four years’ war, while you were skulking at the bung-hole of a whisky barrel, disgustingly dubious whether to swill or coin the contents—was wonderful, and worthy of the applause of such as those who found congeniality in your companionship.

“I propose to give you herein, as explicitly as a limited space and a scanty vocabulary will permit, my opinion of yourself and the thievish conspiracy upon which Clarke commented so injuriously to your feelings. This is the history

of your attempted but baffled robbery : In 1863, after plotting—for it required other knavery in addition to your own to perfect the swindle—you accomplished the first move, the consent to the exchange of genuine property, both land and money, for that which neither you nor your principal and accomplice owned or ever would own. The reduction of this agreement to writing then and there, because that would have prevented the second cheat, its possibility having been but just suggested to you by an incident of the moment and the ease by which the first had been effected—you, by an impromptu lie, postponed. Emboldened by this success you devised a cunningly worded document, binding the transfer of another's land to yourself, and lyingly asserting the payment of an equivalent therefor. Spied upon your victim, an old man, until sickness had prostrated his body and obscured his perceptions, presented your cozening paper, overcome by importunity his objections to transacting business in such an unfavorable condition, and obtained his signature ; then, by a prepared lie, told at a chosen moment, you filched from him \$1,000 00 as boot between the lands. Having gone thus far, and failing to palm off your fraudulent bond upon a purchaser who knew you too well to imagine that in your possession implied an honest ownership, you put it carefully away and waited impatiently for the grave to receive your fancied dupe and deliver to you your booty. Death would not come, and the Legislature enacted the statute of limitations. Into Court you had to go or relinquish a part of your 'swag.' To relinquish a part of your 'swag,' or to establish your claim by perjury, was also a necessity. This was all that was needed to complete the infamy of your scheme, and therefore, inflame your ardor in its prosecution

"To the fabrication of plausible perjury you then applied yourself, and your testimony is the outcome of that diligence. Clarke, I am told, characterized your evidence simply as unvarnished perjury, at which detraction from your depravity you were very naturally indignant. Revolting as is that crime, and odious as is its commission, he did you injustice,

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gross injustice (although in his subsequent correspondence he felicitated himself on the kindly relations existing between you.)' Such genius as yours, reveling in moral muck and eagerly burrowing to the very bottom of turpitude, should not be fobbed off with so miserly a tribute. extemporized, crude perjury, like an ordinary, untutored liar, was obviously far below the design of rapacious craft, rooted in slimy profligacy, and further fertilized by the rankest family corruptions; a felony, though the foulest that might be practiced by tyros, offered too little criminal garbage to appease your ravenous gluttony; malignant calumny relishingly supplemented the staling flavor of the original roguery; tricky, expert and shameless, you must fashion the raw lie into a finished villainy, before your exacting taste in fraud could find its full enjoyment. Your perjury was meditated long and deeply, elaborated with care and skill, and repeatedly rehearsed, until your loathsome admiration of its flagitious perfections broke forth in boasts to those with whom you conversed.

"This studiously composed, maturely considered, and thoroughly digested perjury was, too, for lucre, filthy, indeed, and paltry in amount. Your crime, while devilish from its prolonged contemplation, is despicable from the shabby reward for which you wrought. A penniless pimp would have scorned a secret tender of that temptation for which you yourself have published your prostitution. Yours was a deliberately, patiently, calmly concocted device, for the success of which you invoked the aid of God, through calumnious perjury, to perpetrate a petty theft. It has failed; your zealously contrived machinations have only served to demonstrate beyond the possibility of doubt, that *you are an abject liar, and a vile, groveling, sordid, scurvy scoundrel, with the appetite of a sneak thief, and without the intelligence to compass its gratification.* From richly merited punishment you are protected as is the skunk; your filth, however, shall not afford impunity to insolence as well as to swindling, perjury and calumny, and I thrust before your eyes the assurance

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that every demand from you, similar to the one alluded to in the outset of this letter, will receive instant attention ; accorded to it solely that an abominable nuisance may be abated.

(Signed)

"JULIEN RANSONE."

"N. B. Should your courage prove to have been exhausted in the bullying of a preacher, I now notify you that it is my intention to distribute printed copies of this letter throughout this community and Montgomery, Alabama, where I am informed you may go, so that those who are thrown in association with you shall not be ignorant of your true character.

(Signed)

"J. R."

The defendant pleaded the general issue, and at some time during the trial, the record fails to disclose when, asked permission to amend the same by setting up the damages he had sustained by the act and conduct of the plaintiff. The amendment was not allowed, and the defendant excepted.

The defendant also proposed to file an equitable plea, to the effect that, since the bringing of said action, the plaintiff made an unprovoked assault upon the defendant with the intent to murder him, and wounded him by several shots fired from a pistol, one striking him in the thigh and hip, and the other in the ankle, from which wounds he has been confined to his bed for the space of twelve months, is still unable to walk, and is apprehensive that he will be a cripple for life, to his damage, \$50,000 00. That defendant prays that this amount may be set off against any damages which the plaintiff may recover in his action, and that he may have judgment for the excess. That unless this is allowed, he will be remediless, on account of the non-residence and insolvency of the plaintiff.

The Court refused to allow said plea filed, and the defendant excepted.

The plaintiff introduced evidence, showing that the paper set forth in his declaration was in the handwriting of the defendant, and its publication.

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The defendant then filed the plea of justification, and introduced the following evidence :

1st. Bill in the case of Hope H. Christian *vs.* James B. Ransone, filed to October term, 1869, of Early Superior Court, setting up that the complainant paid to the defendant \$1,000 00 in cash for lot seventy-four, in the sixteenth district of Early county ; that defendant executed and delivered his unconditional bond dated May 11th, 1863, to make titles to said lot on January 1st, 1864 ; that defendant had refused to make titles, and praying specific performance.

2d. Answer of the defendant, denying that complainant had ever paid \$1,000 00, or that he had ever given to him an unconditional bond to make titles to said lot on January 1st, 1864.

3d. John T. Clarke, who testified substantially as follows : Upon the trial of the above stated case, Christian testified that James B. Ransone owned lot seventy-four, and he desired to buy it to settle on ; that James B. agreed that if he could induce Martha Stamper to sell him (James B.) lot eighty-five, he would sell to Christian lot seventy-four for \$1,000 00 in cash ; that Stamper authorized Christian to make such arrangement ; that Stamper had contracted for lot eighty-five with Mitchell, but had neither paid for it nor received titles ; that Stamper executed his bond to James B. to make titles to lot eighty-five, by January 1st, 1864, and delivered it to Christian to be carried to the obligee ; that James B. requested and authorized Christian to pay Stamper \$1,000 00 for him as a part of the purchase money for eighty-five, and that he paid said sum as directed, and received Stamper's bond to James B., and a written showing that he had made the aforesaid payment ; that he (Christian) delivered said instruments to James B., and received from him his note for \$1,000 00, payable to Stamper on January 1st, 1864, and his unconditional bond to make titles to him (Christian) on the day last aforesaid ; that this bond sets forth the true contract between him and James B. ; that he carried but one paper besides the bond from Stamper conditioned to make titles to lot eighty-

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five to James B., to-wit: the aforesaid written showing, on the strength of which said James B. executed the bond to lot seventy-four to him.

Witness does not remember that Christian made any explanation of said written showing upon that trial; he might have done so at the subsequent trial, at which there was a material difference in Christian's testimony. At the time, witness, as attorney for James B. in the above stated case, examined Christian as to said written showing, he did not exhibit it until after the latter had testified as to its contents. He afterwards presented it to Christian, who identified it as the paper; he declined to hand the paper to opposite counsel until he had tendered it in evidence. Christian was subsequently recalled, but he does not remember his making any explanation.

4th. The written showing alluded to:

"Mr. James B. Ransone—Sir: From consultation and my own opinion, it will be well to give bond, as I have no deed. You can make Dr. Christian a deed or give him a bond to make titles when I make you a title to eighty-five. I make a bond to make titles when the note is due. You make and send bond by the Doctor. This 30th April, 1863.

(Signed)

"M. W. STAMPER."

5th. James B. Ransone testified as follows: Upon the trial of the case between witness and Christian, the latter testified that he had made an agreement with witness that if he would induce Stamper to sell lot eighty-five to witness for \$2,000 00, that witness would sell lot seventy-four to Christian. Witness states most positively that he never did make any such agreement with Christian, and he knows it.

Christian swore that witness had authorized and requested him to pay to Stamper \$1,000 00, which statement witness says is false; that he never requested Christian to pay any sum whatever to Stamper.

Christian further testified, that when he carried Stamper's bond to witness, he also delivered a written showing from

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Stamper, to the effect that he (Christian) had paid Stamper \$1,000 00 for witness, which statement witness says is false. Christian never did bring but one written paper from Stamper, which is the one exhibited and which contains no such statement.

Christian also testified that the bond to lot seventy-four, which witness delivered to him, was absolute and unconditional, and set forth the true terms of the contract. This statement is false. Christian came to witness some time in 1863 and stated that Stamper had authorized him to exchange lot eighty-five for lot seventy-four, if witness would pay \$1,000 00 to boot. Witness, thinking he could make better terms with Stamper, put Christian off. Christian informed him that Stamper had agreed to let him have lot seventy-four to settle on. The matter rested thus until Stamper came to see witness at his house. Stamper refused to take less, and witness agreed to the exchange upon the terms first proposed. Stamper stated that he had not paid Mitchell the purchase money for lot eighty-five, and could only give bond for titles. Witness stated that he was willing, upon the promise of Stamper to pay Mitchell soon, to exchange bonds, obligating each to make titles on January 1st, 1864, witness agreeing to give his note for \$1,000 00, and his bond to make titles to Stamper to lot seventy-four, when he, Stamper, should make titles to witness to lot eighty-five. Stamper remarked that he preferred to consult counsel before he proceeded with the matter. Some time afterwards, Christian came to witness with a written paper from Stamper, which is in evidence, and a bond for titles to lot eighty-five. As this was the agreement witness had previously made, witness accepted the bond and proposed to make a bond to lot seventy-four, when Christian said there was no witness and he would call again. About two weeks afterwards Christian returned, at which time witness was lying on a couch sick with fever and in no condition to transact business. Witness is very aged. He told Christian that he was unable to write a bond. Christian replied that he had brought a bond already prepared. He seemed to

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have a good deal of solicitude and anxiety to have the bond then signed. Witness did not read the bond, but asked Christian if it was in accordance with the terms of the agreement made with Stamper? Christian replied that it was, and witness, trusting to his honor, signed the instrument. He did not see the bond from the time it was signed until he was sued upon it. It was not made in accordance with the terms of his contract with Stamper.

6th. The defendant, Julien Ransone, testified substantially as follows: The written copies of the libel (introduced by the plaintiff for the purpose of showing publication) exhibited, he never saw or heard of before. He did not write or publish them, and scorns so low an act, and spurns with indignation every effort to raise a suspicion that he was the author of said written copies. Admits that he wrote the paper set forth in the declaration, but had no idea of writing or publishing a libel. His only intention was to force Christian to send him a challenge, and it was verbose to intensify the insult. He doubted Christian's courage, and sent it by McIntosh to insure his getting it; hence, he requested McIntosh to see Christian read it.

7th. The bond from James B. Ransone to Hope H. Christian, dated May 11th, 1863, binding him unconditionally to make titles to lot seventy-four, on January 1st, 1864, acknowledging the receipt of \$1,000 00 in payment therefor.

8th. Bond from Martin W. Stamper to James B. Ransone, dated April 28th, 1863, reciting the sale of lot eighty-five to Ransone for \$2,000 00, \$1,000 00 of which amount was unpaid, and obligating Stamper to execute a title to the same on January 1st, 1864, provided a note for the amount last aforesaid was paid by Ransome by that time.

9th. The plaintiff, Hope H. Christian, testified substantially as follows: He did not testify that James B. Ransone requested and authorized him to pay Stamper \$1,000 00, but he stated that this was the general understanding of the parties. When Stamper was at the house of witness, he asked him to give him (witness) such a paper as would show that he



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had arranged with him for said James B. for the \$1,000 00. He went out to attend to domestic business, and when he returned he found the note alluded to lying on his table. He supposed that Stamper had done as he was requested. When he carried it to James B. Ransone, it was so badly written that it took both of them to read it. When witness was recalled on the first trial, he explained that it had been so long since he had seen the letter, he could not recollect what it contained.

The jury returned a verdict for the plaintiff for \$6,000 00. The defendant moved for a new trial upon the following grounds, to-wit:

1st. Because the verdict was contrary to the law and the evidence.

2d. Because the amount of damages was excessive, there being no allegation or proof of special damages.

3d. Because the Court erred in charging the jury "that the filing of the plea of justification in this case, admitted the publication of the libel as alleged in the declaration."

4th. Because the Court erred in charging the jury "that if the plea of justification is not sustained, the plaintiff is entitled to damages, the amount of which they were to determine from the proof," there being no evidence as to any damages.

5th. Because the Court erred in the following charge: "that in this case, they (the jury) are not confined to actual damages, but may take into consideration the nature of the libel, and the injury to the feelings and reputation of the plaintiff, and find in addition to the actual damages which may be proved, or even if no actual damage is proved, vindictive or exemplary damages, not only to compensate plaintiff for the injury to his feelings and reputation outside of any actual damage, but to deter the defendant from like wrongs," in this, that the charge about actual damages misled the jury, as there was no actual damages alleged or proven, for that the additional damage cannot be given by a jury, either to deter a wrong-doer, or as a compensation for wounded feelings, unless the proof shows aggravating circumstances either in

the act or intention. Said charge being further illegal in this, that vindictive or exemplary damages can only be recovered when the entire injury is to the peace, happiness or feelings of the plaintiff, the only guide being the enlightened consciences of impartial jurors, in connection with which the worldly circumstances of the parties should be weighed, of which circumstances there was no proof, and therefore, said charge should not have been given.

6th. Because the Court erred in charging the jury, "that if they believed from the evidence, that in addition to the writing and publication of the libel, the avowed object of the defendant was to provoke a challenge and fighting, such being a violation of law, should not be considered in mitigation, but in aggravation of the offense."

7th. Because the Court erred in charging the jury, "that if the plea of justification is filed and is not made out, the filing is an aggravation of the libel, and if the jury find for the plaintiff, they have the right to take into consideration the filing of the plea, and may, if they see proper, and in fact, they are bound to increase the damages by reason of the filing of the plea, if not sustained."

8th. Because the Court erred in refusing to allow defendant's counsel to prove by James B. Ransone, that Hope H. Christian had never called upon him to comply with the obligation and make titles to lot seventy-four, as set forth in the bond for titles from said Ransone to said Christian, but, on the contrary, had stated to him that he was trying to induce Stamper to comply with his contract, so that both parties could obtain titles.

9th. Because the Court erred in refusing to allow the defendant to show that the bond from James B. Ransone to Christian was transferred the day after its execution to one Benjamin Fryer, by a written transfer upon its back, which said transfer was concealed from view by a number of revenue stamps.

(NOTE TO THIS GROUND.) "The Court refused to permit the bond to be defaced for this purpose. The counsel for de-

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fendant stated that such transfer was on the bond, but it did not appear as the bond was then shown."

10th. Because the Court erred in refusing to allow the defendant to amend his pleadings, and to file an equitable plea of set-off, as above set forth.

The motion was overruled and the defendant excepted, upon each of the grounds aforesaid.

FLEMMING & RUTHERFORD, for plaintiff in error.

A. HOOD; I. E. BOWER; T. F. JONES; H. & I. L. FIELDER; R. H. POWELL, for defendant.

MCCAY, Judge.

Were we perfectly satisfied with the rulings of the Court on the trial of this case, and with his charge to the jury, we should not interfere with the verdict. Our Code, (1873,) sections 2947, 3067, gives, in express terms, to the jury large discretion in such cases, and the Courts ought not to interfere with the finding, unless it be so grossly contrary to what is proper as to leave the impression that there was undue bias, prejudice or mistake. But for this very reason it should appear that there was no error in the Court calculated to affect the verdict.

In ordinary cases, when the verdict is for the plaintiff or defendant, if there be an error, and the evidence is so strongly with the verdict that the result must have been the same, even had there been no error, it is mere play to send the case back on a theoretical mistake of the Judge. But when the *amount* of the verdict is a matter to be measured by the enlightened conscience of a jury, then it is of the utmost importance that the jury shall not have been in the least misled as to the principles upon which their verdict is to be founded, or any evidence excluded which may have affected the final decision. In this case, the defendant pleaded justification. If this plea was not fully made out, the plaintiff was entitled to a verdict. But the amount of that verdict is a thing to be settled by the

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jury, according to the evidence and to the nature of the case. It is manifest that in doing this, they ought to have every fact before them calculated to inform their consciences, and that there be no illegal instruction as their guide. If there be error in the Court in these particulars, who can say how largely this error may have influenced the amount of the verdict? We think there was error in excluding the proof that Christian had not, from the date of the bond, May 11th, 1863, until the fall of 1869, called upon the maker of it for a title, and that he had informed Mr. James B. Ransone that he was trying to induce Stamper to pay for lot eighty-five, so that all parties could get their titles.

The point of the charge of perjury was, that Christian swore that the bond of James B. Ransone to lot seventy-four contained the true contract between the parties, and that this was not true. Now any act or saying of Christian going to show that this was not the true contract, ~~was~~, as we think, material to the issue. Was not the fact that Christian quietly stood by for six years and did not demand of James B. Ransone a title in pursuance of the bond, a circumstance of considerable weight in favor of old Mr. Ransone's statement? Was not the fact (if it was true) that Christian had said he was trying to get Stamper to pay for lot eighty-four so that *all parties* could have their titles made, also a circumstance going to show that the true contract was that Ransone's making a title was to depend on his getting a title from Stamper to the other lot? Christian's delay in demanding the title is, unless explained, inconsistent with the idea that the bond of Ransone was absolute. It was one of the issues whether that bond spoke the truth, nay, that was almost the sole issue in this case, as well as in the equity case, and these circumstances were material, as they tended to show that Christian had acted and talked as though Ransone's story was the truth, and the bond not the truth. Nor does it make any difference that these facts were proposed to be proven by Ransone; it does not appear that it was or is one of the issues whether these facts were true. Perhaps Christian did not, at the trial of the equity

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case, deny them. Nor does there seem any reason why Ransone might not prove these circumstances as well as the other facts, even if Christian did deny them.

We think there was error in ruling out this testimony. We think the same as to the entry on the bond. The paper had ceased to be any longer an existing obligation. The decree in the equity case had made it the property of Ransone, and he had the right to mutilate or destroy it if he saw fit. If the bond was in fact transferred, this was a circumstance contradicting to some extent Christian's statement of his anxiety to get the land in 1864 to build on, and stands on the same footing as his delay to ask for the deed and his efforts to get Stamper to comply with his bond, so that he might get a deed.

We are inclined to think that, under our law, the plea of justification admits all the charges in the declaration, as to not only the fact but the manner of publication. The language of the Code is very broad: Code of 1868, section 2996. "By such plea he admits the act to be done." The act and the manner of it are difficult to separate. If the plaintiff is still to prove the mode of publication, he gains very little by the plea, whilst he loses the privileges of one holding the affirmative of the issue.

Punitive damages are only to be given if there be circumstances of aggravation. Whether there be such circumstances or not, is a question for the jury, and not the Court. Even if there be a plea of justification, it is for the jury to say whether there are circumstances of aggravation; that is, whether the admitted facts are of such a character as to constitute matter requiring punitive damages. It may be that the Judge, in using the words "in this case," only intended to say, "in the case I have supposed;" but the language is very fairly susceptible of being understood as meaning by "this case," the case on trial, and was calculated to mislead the jury. Whether the case was a *tort* attended with aggravating circumstances, was a question for the jury alone under the proof, and it was not proper for the Judge to say to them

that in "this case" it was their right to give punitive damages.

The filing of a plea of justification *may*, if it be not sustained by the proof, be a circumstance of aggravation, but we think it was error in the Court to tell the jury that it *must* be so considered by them. All that it was in the province of the Court to say on the subject, was to tell them that the filing of the plea, if the proof failed to sustain it, was a matter which the law authorized them to consider as an aggravation. But it is for the jury, under all the facts of the case, to say if the plea shall have that effect. It may be that the plaintiff's conduct has been such as, whilst it does not completely justify the charge made by the defendant, does yet greatly mitigate and excuse it. The jury may not be quite satisfied that the charge is true, and yet they may feel, from the evidence, that the plaintiff ought not to be considered as grossly in the wrong in making it. In other words, the facts as proven, may show mitigating circumstances as to the act of filing the plea, and the jury may take them into consideration notwithstanding the plea of justification on this question of aggravation.

Section 3261 of the Code of 1873 is as follows: "All claims arising *ex contractu* between the same parties may be joined in the same action, and all claims arising *ex delicto* may in like manner be joined. The defendant may also set up as a defense all claims against the plaintiff of a similar nature with the plaintiff's demand."

It is impossible to escape from the conclusion that by *claims* of a similar nature with the plaintiff's demand, is meant claims arising *ex delicto* or *ex contractu*, accordingly as the demand of the plaintiff is *ex contractu* or *ex delicto*.

We are free to say that this seems to us to be a very startling provision of the Code, and one which a common law lawyer must read with astonishment, especially when it is remembered that in this State special pleading is abolished and a case goes to the jury on the declaration and pleas. But, *ita*

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lex scripta est, and we have nothing to do but to enforce it as best we may.

If one *tort* may be set off against another, we see no reason why an *assault* and battery may not be set off against a libel, as one libel against another. We can see how an attempt to do either may involve very complicated inquiries before a jury. But that is a characteristic of our whole system of pleading, and is, perhaps, no greater evil in the trial of an action *ex delicto* than in the trial of an action *ex contractu*. In an action on a bond, the defendant may plead an open account as an off-set; nay, he may set up a balance due on the settlement of a partnership, and force an investigation of great complication.

Judgment reversed.

THE SAVANNAH AND CHARLESTON RAILROAD COMPANY,
plaintiff in error, *vs.* DANIEL CALLAHAN, defendant in error.

1. The Act of 1869, so far as it may be considered as a legislative interpretation of the meaning of the Constitution, only gives a summary remedy for the enforcement of mechanics' and laborers' liens upon the property of their employers, when the debt is due for the labor actually performed by them, and for the materials furnished, with which and upon which the labor has been performed.
2. Though contractors may be mechanics, yet this fact does not entitle them to the benefit of the provisions of the Act of 1869, if the work is done by them as contractors, through the labor of others employed by them for that purpose.

Mechanics' and laborers' lien. Contractors. Before Judge SCHLEY. Chatham Superior Court. May Adjourned Term, 1872.

McDowell & Callahan instituted proceedings against the Savannah and Charleston Railroad Company to foreclose a mechanics' and laborers' lien for \$26,336 38. The execution issued thereon was levied upon the property of the defendant.

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A counter-affidavit was filed and the property replevied. Pending the litigation the death of McDowell was suggested, and the cause ordered to proceed in the name of Callahan, as surviving partner.

For the remaining facts, see the decision.

JACKSON, LAWTON & BASINGER, for plaintiff in error.

We understand this Court to have established the rule that the "mechanics and laborers," to whom a lien is given by the 30th section of Article I. of the Constitution, and by the Act of 1869 in pursuance thereof, must be those who perform labor in their own persons—with their own hands—or who, in so performing labor, furnish materials for the work: 44 Georgia Reports, 306; 45 *Ibid.*, 561; 46 *Ibid.*, 112, 466–8; 27 Missouri, 39.

And the evidence for the plaintiff below—the admissions of Callahan himself—showed conclusively that neither he, nor McDowell, nor any other person interested as a contractor, performed labor according to the construction of the Constitution and Act of 1869, adopted by this Court.

The view of the lien taken by this Court seems to have had the assent of the General Assembly in later legislation: Acts of 1872, pam. 47; Acts of 1873, pam. 42.

HARTRIDGE & CHISOLM, for defendant.

The Constitution gives the lien to two classes, viz: *mechanics* as a class and *laborers* as a class. An overseer, though not a mechanic, is entitled to the lien if he works by the day: Rust, Johnson & Co. *vs.* Rebecca Billingslea *et al*; 44 Ga., 308.

A mechanic who performs labor and furnishes materials, has a lien, although a vender of machinery has not: R. H. Footman, assignee, *vs.* Pussy, Jones & Co., 45 Ga., 563.

That two classes were intended, is also shown by another provision of the Constitution, providing that laborers on a railroad are protected in their lien even against the claims of the State. This provision also recognizes that the lien attaches to a railroad: New Code, section 5068.

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The lien is not given to the mechanic alone who does the manual work and labor unassisted. If this were true, it would have been unnecessary to name them, because the term laborer would have embraced them. The mechanic has the lien not only for his own labor, but for the labor performed by others under him, and for the material furnished.

When the Constitution was adopted, Irwin's Revised Code was also adopted: New Code, section 5145.

When the framers of the Constitution used the term mechanic, it is reasonable to suppose that they meant such mechanics as had already been the subject of legislation and mentioned in that body of laws known as Irwin's Revised Code. Who were they?

All mechanics * * * shall have a lien on every house or other property * * * for *work done* or material furnished. * * * Irwin's Revised Code, section 1959.

Was it the intention of that Act to give a lien to such mechanics only who built a house with their own hands unassisted? These mechanics were expected to be *contractors*: Irwin's Revised Code, section 1963.

All mechanics shall have a lien on all personal property manufactured or repaired by them, to the extent of the work done and materials furnished, but such lien shall cease on delivery: Irwin's Revised Code, sec. 1967.

If the owner of the property in such case should refuse to pay and the mechanic to deliver, could his possessory lien, or right to detain, be defeated by proof that the foreman of his shop did the work?

Again, all accounts of merchants, tradesmen and mechanics, which, by custom, become due at the end of the year, bear interest from that time upon the amount actually due, whenever ascertained: Irwin's Revised Code, sec. 2031.

The mechanic, then, meant by the Code in force before and at the time of the adoption of the Constitution, was one who did work or performed labor, either individually or by his agents and servants. He was not considered a day laborer, merely; he was treated as a contractor, and his accounts were

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placed upon a footing with those of merchants, tradesmen and others; they were not due and payable daily. The policy of the State seems to have been two-fold: first, to encourage mechanical skill and talent, and secondly, to secure to the laborer his wages.

If, then, the term mechanic, as used in the Constitution, has the same meaning as in the Code, for what does the Constitution give the lien? It is certainly for labor performed by him, his agents or servants, *or* for materials furnished. He may have the lien for the labor alone, or the materials furnished, or for both. In the case of R. H. Footman, assignee, *vs.* Pussy, Jones & Company, this Court alluding to the constitutional lien quoted from the Act of 1869, page 135, in which the word *and* is used instead of *or*. The constitutional reading must control and construe the Act. If, then, the testimony disclosed the facts, as stated in the affidavit, that Callahan & McDowell were both of them practical mechanics, bridge builders, and as such, became railroad contractors, and as such, performed labor, either individually or through their servants and agents, or furnished materials, according to this contract with defendant, in the construction of the railroad which they were engaged to build, the Court did not err in refusing to dismiss plaintiffs' case, and in allowing the jury to pass upon these facts. Others may have been interested, but it appears from the contract that the defendant contracted with the *mechanics* only, and relied upon their skill and ability.

WARNER, Chief Justice.

On the 10th day of May, 1869, the plaintiffs made a written contract with the defendant to construct, in a substantial and workmanlike manner, all that portion of the defendant's railroad from the west end of Coosawhatchie trestle to its junction with the Central Railroad in Georgia, including the construction of a bridge over the Savannah river, and to furnish all necessary materials for the construction of said road and bridge, in accordance with the specifications contained in said

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contract, and on the full and faithful completion of said contract by the plaintiffs as specified therein, the defendant covenanted to pay them therefor the sum of \$475,000 00 in its first mortgage seven per cent. bonds. The road to be constructed was part in South Carolina and part of it in Georgia. The plaintiffs, on the 2d day of April, 1870, foreclosed a mechanics' and laborers' lien for the sum of \$26,336 38, which they claimed to be due them by the defendant under said contract, an execution issued, and was levied on the defendant's railroad and bridge in this State. The defendant filed a counter-affidavit, denying that the plaintiffs had any lien as mechanics or laborers in contemplation of the law, but were contractors, and also denied its indebtedness to the plaintiffs. On the trial of the issue thus formed, in the Superior Court, after hearing the evidence for the plaintiffs, the defendant made a motion to dismiss the proceedings, on the ground that it appeared from the plaintiffs' own showing that they were not mechanics and laborers in constructing the railroad and bridge for defendant, but were contractors only, employing others as the actual laborers to do the work under their direction, and, therefore, were not entitled to the lien claimed, and also moved to dismiss the proceedings on other grounds. The motion to dismiss the proceedings was overruled by the Court. The trial then proceeded, and after hearing the defendant's evidence, and the charge of the Court, the jury found a verdict for the plaintiffs for \$20,000 00. A motion was made for a new trial, on the ground that the Court erred in overruling the motion to dismiss the proceedings, and on various other grounds as set forth in the record, all of which were overruled, and the defendant excepted.

1. The main and controlling question in this case is, whether the plaintiffs had a mechanics' and laborers' lien on the property of the defendant which could be foreclosed and enforced by the summary remedy, as provided for in the Act of 1869, to carry into effect that provision of the Constitution of 1868 upon the subject of the lien of laborers and mechanics. The Constitution only declares that mechanics and laborers shall

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have liens upon the property of their employers for labor performed or materials furnished, and left it to the Legislature to provide for the summary enforcement of the same. This clause of the Constitution could not have been enforced by the summary remedy now claimed by the plaintiffs, but for the Act of 1869. The terms laborer and mechanic, as employed in the Constitution and in the Act of 1869, must be presumed to have been employed in the ordinary sense and meaning of those words. Who is a mechanic? A mechanic is a person whose occupation is to construct machines, or goods, wares, instruments, furniture and the like. Who is a laborer? A laborer is one who labors in a toilsome occupation, a man who does work that requires little skill, as distinguished from an artisan. Such is the definition given by Webster of the words "mechanic" and "laborer." A "builder" is defined by the same author to be one who builds, one whose occupation it is to build, an architect, a shipwright, a mason, etc. If we strictly construe the word "mechanics" as used in the Constitution, it may well be doubted whether the lien created in their favor upon the property of their employers for labor performed, or for materials furnished, was intended to embrace any other property than such as was repaired, or mainly constructed by their labor, with materials furnished by the mechanic in the exercise of his trade and calling. But be that as it may, it is very clear, we think, that the Act of 1869, so far as it may be considered as a legislative interpretation of the meaning of the Constitution, only gives a summary remedy for the enforcement of mechanics' and laborers' liens upon the property of their employers when the debt is due for the labor *actually performed* by them, and the materials furnished by them, with which, and upon which, the labor has been performed for the benefit of the employer. Laborers and mechanics shall have a lien upon the property of their employers for labor *performed* and for materials furnished, is the language of the Act. For labor performed by whom? By the mechanic who claims the lien, and has furnished the materials with which he has performed the labor for, the benefit

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of his employer, and *not* for labor performed by *other persons*. The lien is given to secure the debt due to the laborer or mechanic for his *own labor* and materials furnished by him in the performance of *the* labor for which the debt is due. At the time of the passage of the Act of 1869, all mechanics who had taken no personal security therefor, had a lien on every house, or other property, and the premises to which it was attached, for work done or materials furnished in building or repairing such house, or other property, of superior dignity to any other incumbrance, when recorded, as prescribed by the Code, and could enforce the collection of the debt due them by suit, in the manner as provided thereby: Code, secs. 1959 to 1964, inclusive. The mechanics' lien for labor performed and materials furnished, contemplated by the Act of 1869, was obviously intended for a different class of mechanics' liens than those already provided for, to-wit: that class where the mechanic actually performed the manual labor for their employers, and furnished the materials on which that labor was performed for the benefit of their employers, and not where the mechanic was a contractor only, and not a laboring mechanic. The Act of 1869 was intended to give mechanics a lien for the labor actually performed by them, and for materials furnished in the performance of such labor.

2. It appears from the evidence in this case that the plaintiffs were railroad contractors, and in that capacity made the contract with the defendant set forth in the record. It is true the evidence shows that both the plaintiffs were mechanics, but mechanics can be contractors as well as those who are not mechanics. The contract was not made with them as mechanics who were to perform the labor themselves, and there is no pretense that they have done so.

One of the plaintiffs stated that although he did not labor every day, he did as he always had been doing ever since he had been building railroads, he taught others how to do it; he very often took hold of a shovel and showed a man how to shovel earth—often a wheel-barrow to show them, and would take an auger or a cross-cut saw and lay out trestle timber,

and the other plaintiff was overseeing, and did just as he did. It is very apparent from the contract itself, and the evidence of the plaintiffs, that the debt claimed to be due them by the defendant was not a debt due for labor performed by them and materials furnished as mechanics, for which they had a lien that could be foreclosed and enforced against the property of the defendant in the summary manner as provided by the Act of 1869, the debt claimed to be due them by the defendant was a debt due them as *contractors* and not a debt due them as mechanics for labor performed by them as such, and materials furnished, as contemplated by the Act of 1869, and it would be a gross perversion of the terms and meaning of that Act so to construe it. By the terms of the contract made with the defendant the plaintiffs were to receive, at stated periods, its first mortgage bonds for what might be due them, and the evidence shows that they have already received a large amount of the defendant's bonds and negotiated them on the faith of the lien created thereby on the defendant's road, and now seek to enforce a mechanics' and laborers' lien under the Act of 1869, of superior dignity to all other liens, sell the defendant's road, or so much thereof as is in this State, and thus defeat the lien of the mortgage bonds thereon, which they have received and negotiated to *bona fide* purchasers thereof. That is the plaintiff's case as made by the record before us; and the facts therein contained will furnish the best commentary on the entire transaction. The plaintiffs, when they made the contract to build the defendant's road, did not rely on the mechanics' and laborers' lien for labor performed and materials furnished by them as provided for by the Act of 1869, but on the contrary expressly stipulated in their contract that the debt due by the defendant to them by the terms of that contract, should be paid in the first mortgage bonds of the defendant on its road; that was the lien the plaintiffs expressly contracted for, to secure the payment of the debt due by the defendant to them; and being contractors and not laborers, as contemplated by the Act of

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1869, they are bound by their bargain as stipulated in their contract.

The motion to dismiss the proceedings after the introduction of the plaintiff's evidence, was in the nature of a demurrer to the sufficiency of that evidence, under the law, to have authorized the summary proceeding against the property of the defendant, which had been instituted by the plaintiffs for the collection of the debt alleged to be due them by the defendant. In our judgment, the Court erred in overruling the defendant's motion to dismiss the proceedings. The view which we have taken of this branch of the case will finally dispose of it, and, therefore, it is unnecessary to notice the other points made on the argument.

Let the judgment of the Court below be reversed.

LORENZO D. MONROE, plaintiff in error, vs. JAMES A. FOSTER, defendant in error.

Where A approached B for the loan of money, offering a mortgage upon property to secure the repayment, and B declined, but said that A could get the money if he would *deed him* the property, and A made an absolute deed, taking B's bond to *deliver back the deed* on the payment by A of a sum which was just the amount of the money got by A with a certain amount per month rent, and the possession was not changed in fact, nor the deed recorded :

Held, That whether the transaction was a sale with a right in the vendor to repurchase, or whether the whole was a ruse devised to evade the usury laws and to take a security for the loan of money, was a question of fact for the jury, and the jury having, under the evidence, decreed the cancellation of the deed on the payment of the amount due, the verdict ought, under the evidence in the record, to stand.

Mortgage. Deed. Usury. Before Judge HARRELL. Randolph Superior Court. November Term, 1873.

Foster filed his bill against Monroe, making substantially the following case:

On December 31st, 1869, it was agreed between the com-

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plainant and the defendant, that in consideration of the latter allowing a delay in the payment of \$200 00, which he had previously loaned to the complainant, and to secure which complainant had executed a deed to him to a certain lot in the city of Cuthbert, and in consideration of the further advance of \$800 00, the entire sum of \$1,000 00, to become due on December 30th, 1870, complainant contracted that he would pay to defendant two and one-half per cent. per month as interest on the amount aforesaid for the year 1870. To secure the repayment of said sum of \$1,000 00, with the usurious interest aforesaid, complainant conveyed by deed two other lots to said defendant, taking from the latter a bond to deliver up to complainant the deeds aforesaid upon the payment of the said sum of \$1,000 00, and \$25 00 per month as rent, for the year 1870, by the last day of said year, said bond to be void upon a failure to pay at the time specified. The two lots above mentioned are of the value of \$3,000 00. The \$25 00 termed rent is merely usurious interest. The whole transaction was simply a loan of \$1,000 00 at two and one-half per cent. per month, but covered up under the forms aforesaid to evade the usury laws of this State. On January 1st, 1871, it was agreed between complainant and said defendant that the time of payment specified in said bond should be extended for another year upon the same terms. He has paid to said defendant \$25 00 per month for the year 1870, and for eleven months of the year 1871, making in all \$575 00 for the use of said \$1,000 00.

The bill sets out numerous loans on the part of the defendant to the complainant at usurious rates of interest, and by a calculation seeks to show that the defendant had received in all \$555 33 above the legal interest which should be credited on said \$1,000 00.

Complainant tenders the balance due, after allowing the aforesaid credit, and prays that the deeds aforesaid may be decreed to be delivered up to be canceled, and that the defendant and the sheriff of Randolph county may be enjoined

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from ejecting complainant from the possession of said city lots until a decree is rendered in this case.

The answer of the defendant denied that the deeds set forth in the bill were executed as security for money loaned, but asserts on the contrary, that the defendant expressly declined to lend any money to the defendant at the times said conveyances were made and delivered, and also declined to accept a mortgage on the property described in said deeds as security; that the deeds aforesaid, together with the bond executed by the defendant, express the precise contract that was entered into; denies that the two lots aforesaid were worth \$3,000 00, as charged in the bill, and asserts them to be worth but \$1,500 00; denies every allegation in the bill tending to show that the deeds and bond aforesaid were made to evade the usury laws, and that the monthly payments called rent were in fact usury.

The complainant, by his own evidence, and other witnesses, supported the allegations of his bill. He admitted that the defendant refused to lend him money or to take a mortgage as security, but asserted that the defendant, at the same time, stated that he could get the funds he wished if he would deed to him his lands, with the privilege of redeeming, in the meantime paying the rent therefor, as set forth in the bill.

The defendant testified substantially as set forth in his answer. He was corroborated by James M. Brooks as to the value of the two lots.

The following verdict was returned: "We, the jury, find a decree that the deeds from J. A. Foster to L. D. Monroe, dated 21st July, 1869, and December 30th, 1869, respectively, with the bond of L. D. Monroe to J. A. Foster, dated 30th December, 1869, be delivered up to be canceled, and that L. D. Monroe recover of J. A. Foster the sum of \$625 65, to to be recovered, if not voluntarily paid by the said Foster, out of the lots mentioned in said deeds."

The defendant moved for a new trial upon numerous grounds, and amongst them, because the verdict was con-

trary to the law and the evidence. The motion was overruled, and the defendant excepted.

A. HOOD; E. G. RAIFORD; L. D. MONROE, for plaintiff in error.

1st. There is no allegation of fraud, accident or mistake in making the deeds; they were all written by the complainant, and hence understood by him: *Miller et al. vs. Cotton et al.*, 5 Ga., 341.

2d. When a borrower files his bill in equity to be relieved against a usurious contract, the Court refuses relief, except upon the terms of his paying up the principal sum due and legal interest, notwithstanding the law may have declared the contract void: 10 Ga., 389; 4 *Ibid.*, 221; 9 *Ibid.*, 148, (5); 5 Johns. Chancery Reports, 137; 1 Fonb., (b) 1, chap. 1, sec. 3; 4 Band., 415.

3d. A complainant in equity, who relies for relief upon a tender, must allege all the facts substantially which are necessary in pleading a tender at law: 10 Ga., 127; 34 *Ibid.*, 555.

4th. At law, a party must allege an offer to pay, unconditionally; that he is still ready to pay, and has always been ready to pay, and must do this in equity: 10 Ga., 127; 34 *Ibid.*, 555; 24 *Ibid.*, 211, 475; 1 Selwyn's *Nisi Prius*, (4th ed.) 140—and must be paid into Court when demanded.

5th. The true rule to determine whether the instrument of writing executed by Monroe and Foster make a mortgage or a conditional sale is, if the relation of debtor and creditor remain and a debt still subsists, it is a mortgage, but if the debt is extinguished by the agreement of the parties, or the money advanced was not a loan, and the grantee has the privilege of refunding, if he pleases, by a given time, and thereby entitling himself to a conveyance, it is a conditional sale: *Galt vs. Jackson*, 9 Ga., 151; 4 Kent, side page, 145, and note, and authorities there cited; 7 Cranch, 218; U. S. Condensed Reports, 479; *Conways, ex'r, vs. Alexander*; 9 Ala., 24; 8 *Ibid.*, 807; 40 Ga., 39; 32 *Ibid.*, 633; 30 *Ibid.*, 121; 8 Greenleaf's Reports, 246; *French vs. Sturdvant*, 7 Conn., 143; Hill-

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house *vs.* Dunning, 1 Hilliard on Mortgages, 63. Suppose the houses had been destroyed, thereby greatly reducing the value of the lots below the money advanced, whose loss would it have been? Foster then refusing to pay the money, could Monroe have enforced a demand against him? Was there a subsisting debt due by Foster to Monroe, that he could have enforced?

6th. To show that a deed absolute in form, is in fact a mortgage, it must appear that all the parties to it considered it such, and it is not sufficient that the party executing it considered it such: 9 Miss., 201.

7th. To constitute a mortgage in Georgia, certain things are absolutely necessary. It must *clearly* indicate the creation of a lien, *specify the debt* to secure which it is given, and the property upon which it is to take effect: Code, sec. 1945; also see decision of last term. These requisites arise in Georgia because of our statute, that a mortgage is but the *security for a debt*. Neither the papers in this case nor the evidence, *clearly* indicate the *creation of a lien*, nor *specify the debt*: Burnsides *vs.* Bird Terry *et al.*, July term, 1872. If the Court thinks substantial justice done, we ask the decree be so moulded as to require the money paid into Court at once, or other direction that will secure Monroe in his money: Borum *vs.* Thweatt, January term, 1872.

8th. The intention of parties may differ among themselves; in such case, the meaning placed on the contract by one party and known to be thus understood by the other party, at the time, shall be held as the true meaning: Code, sec. 2714; see, also, 2713 and 2715.

WORRILL & CHASTAIN, for defendant.

McCAY, Judge.

We recognize fully the rule that if there be, in fact, a sale with an option in the seller to rebuy for a fixed sum at a fixed time, the transaction is a conditional sale and not a mortgage, and there is no equity of redemption after the day fixed for

the repurchase has passed. See the case of *Steadman vs. Spence*, at the last term of this Court. But it is perfectly settled, that it is a question of fact for the Chancellor, or, in this State, for a jury to determine what was the true intent of the parties, and that no mere words, whether in parol or in writing, are conclusive. The whole transaction is to be looked to, and if, upon the whole, it appear that the loan of money and security for its repayment was, in truth, the purpose and intent of the parties, it will be treated as such, notwithstanding very strong language may be used at the time to give it a different appearance.

We do not think the evidence in this case is so strong in favor of a conditional sale, as to make the verdict illegal. True, the furnisher of the money did say he would not loan money, and the papers are careful to give the transaction the appearance of a sale. But if all the circumstances are looked to, it will, we think, be ascertained that the jury have found about right. It seems that Foster went to Monroe for money and offered a mortgage. Monroe replied he would have nothing to do with mortgages, but Foster could get the money if he would *deed* him his land. No price was agreed on, no *sale* was negotiated. A deed was made out and signed and delivered, and a bond taken not to make titles, but to *redeliver the deed* when the money was paid with *the rent*. The deed was not recorded, possession was not, in fact, changed. There seems to have been several transactions of this sort, in each of which Foster paid the money and the parties stood as before.

Again, Foster wants money, and the same thing is done. He fails to pay, and another year is given. It appears, too, that the property is or was, at the time, worth over double the amount of money advanced. Here are several of the marks laid down in the books by which to distinguish a loan from a sale, and we are not surprised that the jury considered the transaction a loan, and the papers a mere scheme to hide the usury and put the borrower on such close terms as that he would be most sure to pay. True, the defendant took no note, but having the deed and the other only his bond in

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which the amount was fixed, he needed none. As a matter of course, if it was a loan in fact, Foster owed the money, and it was just as much in the defendant's power to explain and insist on it, as a debt, as in Foster's. If it was a debt at the call of Foster, it was also a debt at the call of Monroe. Were it Foster denying the debt and insisting on the sale, there would, perhaps, be different evidence. Monroe could doubtless show many *admissions* by Foster that it was a debt.

Upon the whole, as we have said, we do not feel authorized to interfere with the verdict. There is enough evidence to justify it, and in such cases, where the intent is the main issue, the verdict of a jury is an eminently proper finality of a dispute.

Judgment affirmed.

GUERRY, OATIS & COMPANY *et al.*, plaintiffs in error, vs.
MARY M. BROWN, defendant in error.

The testimony of a witness was taken by interrogatories. When the case was tried, the witness being present, was introduced and examined orally. On a subsequent trial of the same case, the witness then being absent, his depositions were read. The adverse party was allowed to prove, by way of impeachment, that the evidence of the witness, when examined in Court on the first trial, was different from his testimony as it appeared in the interrogatories. The defendant, in whose behalf the interrogatories were read, had testified on the trial *that the witness had stated to him what was substantially the same as was proven by the impeaching witness* :

Held, That the admission of the testimony is no ground for a new trial.

Evidence. Impeachment of witness. Before Judge HARBELL. Quitman Superior Court. May Term, 1872.

Mary M. Brown brought complaint against Guerry, Oatis & Company, and Theodore L. Guerry and William Harrison, as executors of James Harrison, deceased, upon the following note :

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"\$3,060 00. One month after date we promise to pay Mrs. M. M. Brown, or bearer, three thousand and sixty dollars, value received. 29th January, 1867.

(Signed)

"GUERRY, OATIS & COMPANY,
"JAMES HARRISON."

Credits. "Received, 28th October, 1867, on the within note, \$500 00."

"Received on the within note \$134 69, January 1st, 1868."

The pleas and evidence are necessary to an understanding of the decision, as the ground of error appears fully in the motion for a new trial.

The jury returned a verdict for the plaintiff. The defendant moved for a new trial upon the following ground, to-wit:

Because the Court erred in allowing the plaintiff to introduce James W. Mercer to show that Henry J. Oatis had been examined as a witness upon a former trial of this case at the November term, 1871, and upon that examination had made certain statements contradictory to what he had stated in his answers to a set of interrogatories read upon the trial just had, before the plaintiff had laid a foundation for the introduction of such testimony.

The bill of exceptions discloses the fact that the defendant, William Harrison, had testified on the trial that the witness, Oatis, had stated to him what was substantially the same as was proven by the impeaching witness.

The motion for a new trial was overruled, and the defendants excepted.

B. S. WORRILL; JAMES GUERRY; J. L. WIMBERLY, for plaintiffs in error.

JOHN T. CLARKE, for defendant.

TRIPPE, Judge.

When the witness whose testimony was sought to be impeached testifies, on the stand, on the first trial, he stated a fact, as substantially being a conclusion of his own mind from a conversation with the plaintiff, to-wit: what he considered to be the fact from that conversation. In his interrogatories which had been previously executed, and which, in his absence, were read on the second trial, the same matter was stated more positively, without the addition as to what he considered or concluded the agreement to be, from the conversation. A witness was allowed by the Court, over defendant's (plaintiff in error) objection, to prove what the first witness had stated on his examination at the first trial, to show the qualifications he then put on his statements. The interrogatories of the deceased defendant below, William Harrison, were introduced by defendant. His evidence showed that the witness whose testimony was sought to be impeached, had stated to him substantially what was proven by the impeaching witness. The impeached witness, so to call him, was also a party, a co-defendant in the case at the first trial.

We recognize the rule that a witness who is sought to be impeached should have opportunity to explain to protect himself, and that the party introducing him has rights dependent on it that should be regarded. But in this case, the impeachment was so slight and the defendant Harrison, who was, through his representative, the only defendant at this trial, having proven the same thing which was testified to by the impeaching witness, we do not think it is a ground for a new trial. It is proper also to add, that Oatis, the witness who was impeached, was not a party to this trial. Harrison was the security, and a new trial from the former verdict had been granted only to him.

Judgment affirmed.

JOHN F. POWELL, plaintiff in error, vs. CLARIDA QUINN *et al.*, defendants in error.

1. Courts of equity will not interfere with the regular course of an administration, by appointing a receiver to take the assets of the estate out of the hands of the administrator, unless the danger be imminent, and the charges in the bill be positive and specific.
2. The process of injunction ought not to be used to restrain one from selling property to which he has apparent title, except upon positive charges and strong grounds to believe such restraint necessary to prevent wrong.

Equity. Injunction. Administrators. Receiver. Title. Before Judge PATE. Dooly county. At Chambers. January 25th 1873.

Clarida Quinn and Elias Godwin, as next friend of Charlie Quinn, an infant, filed their bill against John F. Powell, making substantially the following case:

Charles M. Quinn, the father of Charlie Quinn, was the son of Clarida Quinn, and brother-in-law of Elias Godwin, Godwin having married his sister. Charles M. Quinn married Victoria Chastain on the 14th day of February, 1871, and died intestate on the 18th day of October, 1871. His widow also died intestate, on the 4th of September, 1872, leaving as her only heir and the only heir of her deceased husband, the infant child Charlie, who was born subsequent to the death of his father. The complainants, Mrs. Clarida Quinn, who is the grandmother of the infant Charlie, and Elias Godwin, who is, by marriage, his uncle, have the custody of said infant. Charles M. died possessed of valuable property, consisting of personalty, choses in action, accounts and notes due to him for medical services. Victoria died possessed of valuable property, both real and personal. Victoria, prior to her marriage, was an orphan, and the ward of one McKenzie, who, while guardian of Victoria, and before her marriage, died in possession of her estate, and at his death said estate passed into the hands of his administrator, William Hooks. Complainants have no means of ascertaining the value of Victoria's estate while in possession of McKen-

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zie, and which passed into the hands of his administrator. Prior to the marriage of Victoria, the defendant, John F. Powell, her half-brother, was appointed her guardian, and that to him her whole estate was turned over by Hooks, the administrator of McKenzie, her former guardian.

The defendant, under a pretended settlement with his ward, after the death of her husband, obtained a dismissal from his guardianship from the Ordinary of Dooly county. While guardian of Victoria, he purchased with her money the lot of land on which he now resides, for \$1,225 00, and took a deed thereto in his own name. Defendant had great influence over his ward and could control her by persuasion and entreaty, or by threats and intimidation. In the pretended settlement with his ward, he made and delivered to her a deed to two hundred acres of poor, pine land, almost worthless. Upon the death of Charles M., defendant took possession of his entire estate, and upon the death of Victoria, he took possession of her entire estate, and now has it in his possession. Defendant obtained the guardianship of Victoria by misrepresentations, and for his own advantage. His failure to settle with her husband was illegal and fraudulent, and for the purpose of obtaining advantage of his ward. His pretended settlement with his ward, while she was subject to his influence and control and without full knowledge of her rights, was wrongful, fraudulent, illegal and inequitable. He, as such guardian, has never made a full and complete settlement, and the order of the Ordinary of Dooly county dismissing him from his guardianship was obtained by fraud and misrepresentation, and is, therefore, void. The purchase of the lot of land from Waters by defendant with the money of his ward, and taking the deed to said lot in his own name, was a fraudulent conversion of his ward's estate. The defendant, before becoming guardian of Victoria, was worth but little, almost, if not entirely, insolvent. Soon after the purchase of the lot of land from Waters, he moved thereon, and now resides on it. Defendant, having absolute control over his ward, compelled her to leave her own home and remove to his, im-

mediately after the death of her husband. Defendant, in his settlement with his ward, by giving to her a lot of land, poor and almost worthless, in lieu of the lot of land purchased with her funds, was guilty of bad faith, and violated his trust as guardian. The defendant, immediately after the death of Charles M., having taken possession of his estate, proceeded to collect various accounts due said Charles M. for medical services, and has never, in good faith, accounted therefor.

Having converted the estate of Charles M. to his own use, defendant induced Victoria to take out letters of administration upon the estate of her deceased husband, Charles M. for the purpose of obscuring his own illegal and wrongful acts. He took possession of Victoria's estate upon her death, without right or authority of law to do so. He has never applied for letters of administration, but is daily using said estate for his own benefit, in fraud of the rights of the infant Charlie, and is under no bond safely to keep and account therefor. He is proceeding to obtain guardianship of said infant Charlie, and is not competent for such appointment, because he is indebted to said child as herein before stated, and because he is greatly involved, having but little property besides the lot on which he resides, purchased as above set forth. He is daily using for his own benefit the estate of said infant, and wasting the same; he is wholly unable to respond for any amount, in law or equity, that might be recovered against him, and the whole of said estate will be lost to said infant unless the said defendant is restrained by the Court.

Complainants are apprehensive that the defendant, after he has information of this suit, will sell and convey, or encumber the lot on which he resides, and the other property of said infant's estate, unless restrained by the Court. Complainants pray,

1st. An injunction restraining defendant from selling the lot on which he resides.

2d. The appointment of a receiver to take charge of all the property belonging to the estate of Charles M. and Victoria Quinn.

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3d. That defendant may be enjoined from further interference with said estate, and that all legal proceedings concerning said estate be suspended till the further order of the Court.

4th. That if defendant fails or refuses to deliver to the receiver all the property of said estate, they pray an order directing the sheriff to seize said property and turn over the same to the receiver.

5th. The appointment of a guardian *ad litem* for the infant Charlie.

6th. That defendant may be compelled to make a full and accurate settlement with said infant child, and that the order of the Ordinary of Dooly county, dismissing defendant from his guardianship of Victoria, be set aside.

7th. That the land and other property, bought with the money of defendant's ward, Victoria, be decreed the property of her heir, the said infant.

The defendant answered substantially as follows: Denies all charges of fraud and mismanagement contained in the bill; admits that said Charles M. had some property at the time of his death, and that his widow administered upon his estate, and says that at her instance and request, he, being her half brother, acted as her agent, and assisted her in the management of said estate, and that, as such agent, he acted faithfully and turned over to her everything that came into his hands; states that one of the complainants, Clarida Quinn, and her daughters, except Mrs. Sutton, treated Victoria with cruel neglect and unkindness from the time of her marriage to Charles M.; that upon the death of Charles M., Clarida Quinn, who, till then, had lived with Charles M., had the body buried without consulting Victoria as to the place of burial; and that on the next day thereafter, during the absence of Victoria, and without her consent, she procured J. R. Holmes, Solomon Zant and Edmond McLendon to go to their homes and search and examine the books, accounts, etc., of said Charles M. Quinn; that at this time Victoria was in delicate health, and soon thereafter gave birth to the infant Charlie, and

that she was greatly grieved and shocked by the cruel treatment of the said Clarida, who entirely ignored her rights as the wife and widow of Charles M.; that Charles M., in his lifetime and Mrs. Clarida together, had a farm, and that after his death said Clarida denied to Victoria, who had become administratrix of Charles M's estate, that he, Charles M. ever had any interest in said farm; that the said Clarida had other property in her possession which belonged to Charles M., as shown by tax returns, and that she took possession of it wrongfully upon his death; that Victoria, unable longer to submit to the cruel and harsh treatment of Clarida, left her house and removed to the home of defendant; that her health continued very bad for four or five months thereafter until the birth of the infant Charlie, and afterwards till her death; that during all this time the said Clarida, though living only one and a half miles distant, never went to see Victoria or the child, and did not even send to her a message; that about five months after the birth of her child, Victoria removed to Spalding, Macon county, where she had purchased a house and lot, where she died on September 4th, 1872; defendant immediately removed the child and all movable property on the place to his house, where said property has been safely kept and is now held; afterwards the said Clarida applied to the Ordinary for letters of guardianship for the child, which were refused, and letters granted to defendant, at the November term, 1872, together with letters of administration on the estate of the said Victoria. Defendant says Victoria was left an orphan when only five years old, and that she was raised by him as his own child, and he denies, in any manner, ever having defrauded her, and that it does not become complainant Clarida, to prefer, in behalf of said orphan, charges of fraud against him; she was unrelentingly cruel towards Victoria during her lingering illness and until her untimely death, and neglected her orphan until its property made it an object of interest to her; denies that the land on which he lives was bought with the effects of the said Victoria; he bought the land from J. D. Waters, and gave for it certain notes on John A. Ingram, and

a buggy, which were accepted by said Waters in full payment for said land; denies that the land turned over by him to Victoria is almost worthless, but says it is fully worth all the balance due by him, at that time, to said Victoria; states that he paid for it about \$2,500 00, and that his said settlement with her was made in perfect good faith, and that said Victoria was not induced to make it by any improper influence; says he has collected only \$5 00 of the estate of Charles M. since the death of Victoria; he denies that he has wasted or converted to his own use one cent of Victoria's estate before or since her death.

Conflicting affidavits were read as to whether the land on which defendant was residing was purchased with his own money, or with that of his ward, and also, as to the amount of the accounts due to the estate of Charles M. Quinn, collected by the defendant.

Affidavits were introduced showing the value of the land turned over to Victoria Quinn by the defendant, in settlement of his liability as her guardian, to be \$2,000 00; and also, unkind treatment on the part of Clarida Quinn and her daughters, to the said Victoria.

The Chancellor granted the injunction as prayed for, and appointed a receiver. To which judgment the defendant excepted.

C. T. GOODE; J. L. TOOLE, by Z. D. HARRISON, for plaintiff in error.

The plaintiff in error (defendant in bill) being the administrator, with good bond, and no danger to the estate or parties in interest, appearing, the Court should not appoint a receiver. A receiver is only appointed against a party in possession under a legal title, in cases of fraud *clearly proved* and of *imminent danger*, if the intermediate possession should not be taken under the care of the Court: See Edwards on Receivers, 19 and 20; 19 Vesey, 50; 2 Young & Collins, 351; 13 Vesey, 266; 2 Vesey, Sr., 360; 16 Vesey, 70; 3 Daniel's Chancery Practice, 401, 2, 3, 4, 6, 7, 416, 422; 8 Paige's Re-

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ports, 475; 1 Jack. & Wal., 657; 10 Georgia, 288, Jones vs. Dougherty; 23 *Ibid.*, 31, Johns vs. Johns *et al.*

POE, HALL & POE; S. R. GOODE, for defendant.

McCAY, Judge.

1. It ought to be a very strong case, indeed, to justify a Chancellor in appointing a receiver and taking the assets of an estate out of the hands of an administrator duly appointed by the Court of Ordinary. The Ordinary has constitutional jurisdiction over the subject matter, and special reasons should appear why that jurisdiction does not answer the ends of justice. The Ordinary may discharge an administrator and appoint another; he may require new security, and he may compel the delinquent administrator to account and deliver up the property as well as a Court of chancery can do it. There is no charge in this bill, so far as the assets of Mrs. Victoria Quinn's estate are concerned, that shows any immediate imminent danger of waste, or of any wrong which the Ordinary may not effectually grapple with and prevent. The charges in the bill are wanting in certainty, and it would be dangerous to use the extraordinary power of appointing a receiver on such allegations. Fraud is charged, and misrepresentation in obtaining the letters, but no specification is made, no facts detailed. This is entirely too loose and indefinite.

2. Nor do we see any necessity for the injunction against the defendant selling the land he lives on. It appears that he made a settlement with Mrs. Quinn during her life, and after her maturity. Not a word is said showing that settlement to be unfair, or that any concealment was made. Nothing is charged but that the defendant had great influence over his sister. Perhaps he had; but does this make out a case of an improper use of that influence? Why should there be any injunction? The filing and pendency of the bill will be a notice of *lis pendens*, and any purchaser of the land will take it subject to the decree. The evidence, too, is very strong that the land was, in fact, bought with defendant's own means,

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and before he was appointed guardian of his sister or got any of her effects. This disposes of all the matters in the judgment complained of, except the appointment of a receiver to take possession of the assets of Dr. Quinn. We see no impropriety in that, although, perhaps, the Ordinary was the proper tribunal to see to that. But as the parties are in equity, we see no objection to gathering up those assets by a receiver. The infant has no estate that does not come from either its father or mother. That estate, so far as it comes from the mother, is protected by the administration bond. If that is not good, the Ordinary can make it so.

Judgment reversed.

BENJAMIN F. WILLIAMS, plaintiff in error, vs. SAMUEL L. BARLOW, defendant in error.

1. It was error in the Court to charge "that upon the failure of the purchaser at sheriff's sale to comply with the terms of the sale, the sheriff might lawfully put up and sell the property at a subsequent sale day, without readvertising the property, and that, in the meantime, he had the right to sell and convey the property to any person who would come forward and take the bid off the delinquent bidder's hands, and pay the money, particularly if it was acquiesced in by the delinquent bidder."
2. Where property was advertised for December sales, but was not sold until the first Tuesday in January, and then without any new advertisement, and the purchaser failed to comply with the terms of the sale, but some days afterwards transferred his bid to another who did comply, receiving a conveyance from the sheriff:
Held, That he acquired no title.

Judicial sale. Sheriff. Title. Before Judge SESSIONS. Ware Superior Court. September Term, 1872.

For the facts of this case, see the decision.

W. B. FLEMMING, for plaintiff in error.

WILLIAM WILLIAMS, by LESTER & THOMSON, for defendant.

WARNER, Chief Justice.

1. This was an action of trover brought by the plaintiff against the defendant, to recover the value of a steam saw-mill, including steam engine, boiler, trucks, chains, saws, and all other machinery belonging to said steam saw-mill. On the trial of the case, the jury found a verdict for the defendant. A motion was made for a new trial, which was granted by the Court, and the defendant excepted. The defendant claims title to the property under a pretended sheriff's sale, by virtue of a certain lien *fi. fa.* which had been levied thereon in favor of Scarlett vs. Gordon *et al.* The Court granted the new trial on the ground of error in the charge of the Court to the jury, "that upon the failure of the purchaser at sheriff's sale to comply with the terms of the sale, that the sheriff might lawfully put up and sell the property at a subsequent sale day without re-advertising the property, and that, in the meantime, he had the right to sell and convey the property to any person who would come forward and take the bid off the delinquent bidder's hands and pay the money, particularly if it was acquiesced in by the delinquent bidder." The new trial was properly granted on this ground, in view of the evidence contained in the record.

2. The property had been advertised to be sold by the sheriff of Camden on the first Tuesday in December, 1868, to satisfy a *fi. fa.* under the lien law, in favor of Scarlett vs. Gordon. On the first Tuesday in January, 1869, the property was sold by the sheriff under the December advertisement, and the sheriff was told at the time the sale was not legal, and it was bid off for the sum of \$405 00, the bidder not complying with the terms of the sale, but some days afterwards transferred his bid to the defendant, who was not present at the sale, and he paid the amount of the bid to the sheriff, who conveyed to him a title to the property for that sum, when the evidence in the record shows the property was worth \$2,000 00 or \$2,500 00. The objection is that the sale on the first Tuesday in January, 1869, under which the

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defendant claims, not being a legal sale, and known not to be so at the time, the property did not bring one-fourth its value at that sale. It is asking quite too much of this Court to control the discretion of the Court below in granting a new trial on the statement of facts disclosed in the record before us. The plaintiff should not be deprived of his title to his property under the mere form and color of pretended legal proceedings, and we are here to see to it that he shall not be.

Let the judgment of the Court below be affirmed.

WILLIAM M. TENNILLE, plaintiff in error, *vs.* LUCY PHELPS *et al.*, defendants in error.

A testatrix made her will in 1863 and died. By one item of her will, she directed her executors to keep up her plantation in Quitman county, and work her slaves thereon, declaring that she desired this to be done "for the purposes hereinafter to be mentioned." In the same item she directed her executors, in case the plantation should be unprofitable, or there should be danger of a depreciation or loss of her property, to sell the same, in their discretion, and invest the proceeds in interest bearing securities. In the next item, she gave certain amounts of money to her nephews and nieces, "to be paid out of the plantation, without interest, after paying all expenses arising from its prudent management." In another item, she gave all the use of her estate to her son, her only living child, appointing her husband his guardian, and directing that her husband should hold the property as trustee for her son, and receive the profits in trust for his use during the life of the husband, but without accountability, he to preserve the *corpus* of the estate for the son. She appointed her husband and his brother her executors. The testatrix died in 1864. The slaves were emancipated; and it then became impracticable to carry out the scheme of working the plantation with the slaves, and thus raising the means to pay these legacies:

Held, That, taking the whole will together, the testatrix intended the legacies to her nephews and nieces to be paid only out of the profits to be made by working the slaves upon the land, and that, as this became impossible on the emancipation of the slaves, the legacies to the nephews and nieces fail with the failure of the fund, and the *corpus* of the estate went to the son free from any charge to pay the legacies to said nephews and nieces.

Wills. Legacies. Before Judge KIDDOO. Quitman Superior Court. May Term, 1873.

Lucy Phelps and Fannie Phelps, by their next friend, David Phelps, Nathan Belton, Mary F. Howard, formerly Belton, and Frank Armstrong and Hewitt Armstrong, by their next friend, S. D. Belton, filed their bill against William M. Tennille, Delaware Morris, administrator, *cum testamento annexo*, of Lucy M. Tennille, John F. Webb, one of the securities of the administrator, and William Harrison and Theodore L. Guerri, executors of James Harrison, deceased, the other security, making substantially the following case:

Lucy M. Tennille died in 1864, leaving a will, the only material portions of which are as follows:

Item 1st. Does not relate to property, but expresses the christian faith and hope of the testatrix.

Item 2d. Directs her executors to pay just debts and demands, that those to whom she may be indebted shall get their own as soon as her executors shall find it convenient; and for this purpose, authorizes them to use any funds which may be on hand at her death, or which may come to their hands from collection, or which may accrue by virtue of any of the provisions of the will.

Item 3d. Directs the sale of her residence in Columbus, and the application of the proceeds to the payment of her debts, the improvement of her plantation, or such other investments as the executors, in their judgment, think best.

Item 4th. "It is my will, and I hereby direct that my executors shall keep my plantation in the county of Quitman, in this State, and that the same shall be cultivated, with my slaves thereon, for the purposes hereinafter mentioned; unless, however, my slaves be dissatisfied, and from any cause involving or threatening a great depreciation in their value or loss, or if my said farm shall become unprofitable. In any of these events, to be judged of by my executors, they are hereby authorized to sell and dispose of the whole of my estate, both real and personal, in such way and manner as they shall judge

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will best contribute to the interests of my estate, and my executors are hereby authorized to invest the money arising from said sale in safe and interest-paying securities. I further direct that my executors, if it is practicable, shall permit my slaves, in the event they shall make sale, to select their owners, who may be willing to pay a fair price for them, and, as far as practicable, to sell them in families."

Item 5th. "I hereby give and bequeath to Nathan Belton, the son of my brother Solomon D. Belton, the sum of \$1,000 00, to him and his heirs and assigns forever. I also give to Mary Fannie, the daughter of my said brother, the sum of \$1,000 00, to have and to hold to her in trust, for her sole use and benefit, as her sole and separate estate, for and during her natural life, and not in any way or manner to be made liable for the debts or contracts of her present, or of any future husband, and at her death to be equally divided among her children, who may be living at the time of her death, and hold to them and their heirs and assigns forever. I also give to Fannie Phelps and Lucy Phelps, daughters of Laura and David Phelps, the sum of \$1,000 00 each, as their sole and separate estate, for their sole use and benefit during their life, and at their deaths to go to and be equally divided between their children, (each family for itself,) who may be living at their death. I also give to Hewitt Armstrong and his brothers, sons of Lucy Armstrong, the sum of \$500 00 each. I also give a child named Lucy Tennille, a daughter of Nancy Smith, of Quitman county, and who is a daughter of William Drake, my overseer, the sum of \$300 00, to be expended in her education. It is my wish, and I hereby direct, that the foregoing bequests in these items made, shall be paid out of the property and income of my plantation, (without interest) whenever my executors shall see proper, and can conveniently spare the same, after paying all the expenses necessarily arising from a prudent management of said plantation, and in the event of the death of any of the aforesaid females before their maturity, or having no child or children at the

time of their death, then said bequests shall go to their brothers and sisters in equal shares."

Item 6th. Gives to Tennille Patterson, to be paid as soon as the condition of the estate, in the judgment of the executors, will permit, \$2,000 00.

Item 7th. Gives certain negroes to the children of her brother Solomon D. Belton, and certain lands in Butler county, Alabama, already in his possession, with directions.

Item 8th. Relates to an afflicted servant, Dora, and her mother, giving directions, etc.

Item 9th. "I give and bequeath to my beloved son William Meiggs Tennille, all the rest and residue of my estate of whatsoever character the same may be, to have and to hold to him, his heirs and assigns forever, subject, however, to the following incumbrances, conditions and provisions, to-wit: that my beloved husband shall have the control and management of my whole estate, for and during his life, with the power and authority to plant and gather the crops, and control the slaves and other property, sell and dispose of the crops, and receive the proceeds arising from the sale during his life, in trust for my said son, without accountability for the use of the same, so that no unnecessary waste shall be committed, nor shall the same be subject to be taken for any debts or liabilities against him at the date hereof. And I do hereby appoint him as my testamentary guardian of my said son, during his minority, not doubting that my said beloved husband, from his age and experience, will manage and control said estate for the best interest of our said son, before and after his maturity, for and during the life of my said husband. And if my said son shall die before his said father, my said husband, he shall continue to manage my said estate in connection with my other executor, Francis A. Tennille, my husband's brother, who shall manage the same together in the same way and manner aforesaid. Provided, my said husband, from his age or debility, shall at any time require his said brother's assistance, taking and receiving to himself, however, the proceeds arising from my said estate, for the support

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and in trust for my said son, and preserving the *corpus* of the property, in case of his, my son's death, for the benefit of the wife and children of my said son, if he should have any at his death, or in default thereof, for the benefit of the bequest hereinafter made."

Item 10th. Provides that in the event her said son should die without wife, child or children, living at the time of his death, and after the death of her husband, she gives as follows: To Hyacynth Garrett and Grace F. Garrett, of Virginia, each, \$1,000 00; to the Orphan Asylum of Columbus, \$1,000 00; to the poor of the Methodist Church at Columbus, \$500 00, to be paid in annual sums of \$100 00; to Lucy M. Emory, of Baldwin, \$1,000 00; to Miss W. Tison, of Griffin, \$500 00; to the Southern Bible Society the sum of \$1,000 00; to the Tract Society of which the Methodist Episcopal Church, South, may be connected, \$1,000 00; to the China Mission of said Church, \$1,000 00; John Simmons, California Missionary, \$1,000 00; Georgia Conference, for negro missions, \$1,000 00; to the wife and children of Rolla Green, \$1,000 00; to Lucy Tennille Vincen, of Columbus, \$1,000 00; to George Adams, a wounded soldier, \$500 00. All these sums in this item mentioned to be paid in the manner specified, by her executor, or the legal representative having her estate in charge and keeping, after the emergency may occur upon which said bequests are predicated—that is to say, upon the death of her son, without wife or child or children living at the time of his death, and after the death of her said husband. And in the event such contingency should happen, she gives and bequeaths the residue of her estate to the next of kin of her said son, to have and to hold to them, their heirs and assigns forever.

Item 11th. Gives direction as to the instruction and management of the slaves.

Item 12th. Appoints her husband, William A. Tennille, and his brother, Francis A. Tennille, executors, and William A. Tennille testamentary guardian and as trustee of William M. Tennille.

The executors appointed by the will failed to qualify, and the defendant, Delaware Morris, was appointed administrator *cum testamento annexo*, and gave bond in the sum of \$300,000 00, with John N. Webb and James Harrison as securities, for the faithful execution of the trust. James Harrison has since died, and the defendants, William Harrison and Theodore L. Guerry, have qualified as his executors.

Complainants claim as the legatees set forth in the fifth item of said will. The administrator received sufficient assets to have paid to them said absolute legacies. He has turned over to the defendant, William M. Tennille, the residuary legatee, a plantation of the value of \$10,000 00, said legatee receiving the same, though well aware of the fact that complainants were still unpaid. While the said Lucy and Fannie Phelps, and the said Mary F. Howard and Nathan Belton were residents of the State of Alabama, and the said Hewitt and Frank L. Armstrong were residents of the State of Louisiana, the said Mary F. being a *feme covert*, and the said Lucy, Fannie, Hewitt and Frank, minors, the said administrator applied for, and, at the May term, 1870, of the Court of Ordinary of Quitman county, obtained letters of dismission. This was without the knowledge or consent of complainants, and in fraud of their rights. Said administrator is insolvent, and beyond the aforesaid plantation there are no visible assets belonging to the estate of testatrix. William A. Tennille, the husband of testatrix, died in the latter part of 1864.

Waiving all discovery, complainants pray that they may have a decree against said administrator and his securities for the several legacies mentioned in the fifth item of said will, with interest on the same from such time as it may appear to the Court that said administrator ought to have paid the same. Pray similar decree against William M. Tennille, the residuary legatee, and that said plantation may be held subject to the payment of said decree, and that he, in the meantime, be enjoined from disposing of the same. That the writ of *subpoena* may issue.

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The bill was filed on April 15th, 1872.

The answers of the defendants are omitted as unnecessary to an understanding of the decision.

Pending the trial, the evidence disclosed the fact that Mary F. Howard and Nathan Belton were over thirty years of age at the time of the discharge of Delaware Morris, administrator *cum testamento annexo* as aforesaid, and that the other complainants were minors. Upon motion of solicitors for complainant, the bill was dismissed as to the said Mary F. and Nathan.

The allegation in the bill that the discharge aforesaid was obtained by fraud, was abandoned. It was shown that said administrator and said William M. Tennille knew that the legacies to complainants had not been paid when said property was turned over to the residuary legatee; that the question of the payment of said legacies was discussed with the Ordinary at the time said discharge was granted, and that he advised the administrator that they were not payable, as the testamentary scheme had been destroyed by the emancipation of the slaves. The non-residence of John N. Webb, security on the administrator's bond, and the non-residence and bankruptcy of Delaware Morris, the administrator, were shown; also, that William M. Tennille, the residuary legatee, had become of age before said property was turned over to him; the death of the testatrix and the probate of the will in the year 1864; the death of the husband of testatrix in the latter part of the same year; the discharge of the administrator at the May term, 1870, of the Court of Ordinary; that the plantation before referred to was worth more than the legacies in controversy.

The following receipt was also placed in evidence:

"Received, Georgetown, Georgia, October 22d, 1869, of Delaware Morris, administrator of L. M. Tennille, deceased, the sum of twenty-two thousand dollars in full and complete settlement of all acts and liabilities in said estate, and guarantee to him and his securities full and perfect discharge from

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the same; all outstanding liabilities of the estate to be settled by myself. (Signed)

WILLIAM M. TENNILLE."

"Signed and authorized in presence of

(Signed)

"J. T. HILL,

"W. J. JORDAN, Ordinary."

It was also shown that a part of the \$22,000 00 receipted for was personal property on the said plantation.

The Court, amongst other things, charged the jury as follows: "The legacies to the complainants in this case, in the opinion of the Court, are absolute general legacies, directed to be paid out of the profits and income of the plantation of the testatrix, without interest, whenever her executors shall see proper, or when a reasonable time to carry out these provisions in the manner pointed out had elapsed. But if you believe from the evidence that the administrator, knowing of the claims of the complainants, did turn over to the residuary legatee, the whole estate which came into his hands, including the plantation described in the fifth item of the will, and had not paid to these complainants the sums bequeathed to them, then he committed a *devastavit* in so doing, and he and his securities would be liable to each of the complainants for the amount of his or her legacy, with interest from the date he so turned over the estate to the residuary legatee. It is, and was the duty of the administrator, under the law, to carry out the provisions of the will, and the moment he turned over said plantation and thus placed it out of his power to receive any profits and income from the same, he became liable to the complainants. The destruction of the property in negroes who were expected to cultivate the plantation, did not, of itself, prevent profits and income arising therefrom, and if it became unprofitable, it is provided by the fourth item of the will that the executor is authorized to sell the whole estate and invest the proceeds in safe securities, and had he done so these legacies could have been paid out of the profits and income thereof, and they should have been before the property

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was turned over to the residuary legatee. The administrator had no right to turn it over until complainants had been paid from the profits and income, and he and his securities became liable if he did so. If William M. Tennille had full knowledge of the claim of these complainants before he received the plantation, he is also liable to them."

The jury returned a verdict for the complainants against all of the defendants for the principal amounts of their respective legacies, with interest thereon from October 22d, 1869.

The defendants moved for a new trial, because the verdict was contrary to the evidence and to equity, and because of error in the charge. The motion was overruled, and the defendant, William M. Tennille, excepted.

HERBERT FIELDER; JAMES H. GUERRY, for plaintiff in error.

JOHN T. CLARKE, for defendants.

McCAY, Judge.

The real question in this case is, what is the meaning of Mrs. Tennille's will, as respects the rights of the legatees filing the bill? Were the legacies given to them money legacies? Were the directions to pay them out of the profits of the plantation only directory and demonstrative? Or were they, in the nature of specific legacies, not payable at all if the fund provided should fail? The Court below held the former. Was that error?

In the construction of wills, the great thing to be sought for is the intention of the testator. The whole will is to be looked to, and all its parts to be harmonized, if possible. The surroundings of the testator are to be considered, the objects of his bounty, his family relations, the nature and extent of his estate, etc. If there be any doubt arising from the mere words of any clause, all the circumstances alluded to may be considered in resolving it. These are not only principles well

settled by the authorities, but are the positive enactments of our own Code: Irwin's Code, secs. 2420, 2421. As a general rule, it is true that a gift of money, to be paid from a specified fund is, nevertheless, a general legacy, and a failure of the fund does not destroy the legacy: Code, sec. 2422. But it is unquestionably true that a testator *may* so charge a money legacy upon a particular fund as to make the legacy follow the fate of the fund. To say the contrary, would be to hold that a testator has not a right to make such a disposition of his property as he pleases; that if he has a horse, he may give it to A, and the legacy fails if the horse die before the testator; but if he have a particular fund and give that, he cannot so give it as that if the fund fail, the legacy also fails.

All that the rule means is, that where a general money legacy is given, the testator is not to be presumed to have intended to make it dependent upon the existence of a fund merely because he has indicated that it is to be paid out of that fund. On the contrary, if the will gives a money legacy, and a particular fund is charged with the payment of it, the presumption is that this only indicates an intention to furnish an additional security for its payment; since, if the fund charged is sufficient, the legacy shall not abate, though the condition of the estate is such that other general legacies are compelled to abate: 3 Vesey, Jr., 640; 5 *Ibid.*, 206. But, to make out a case of this kind, the will must show that the testator intended a general money legacy. Nor does it at all follow because a legacy is expressed in dollars that it is a general legacy. As if a legacy be of \$1,000 00, deposited in a certain chest, bag or purse, or in the hands of A: 1 Atkins, 508; 1 P. W., 540; Pulsford *vs.* Hunter, 3 Brown's Chan. Cases, 416.

The whole inquiry is simply whether the testator intended to give a sum of money generally, referring to the fund merely as a mode of payment, or whether he intended to give either the whole or a part of a certain specific sum or fund.

In Page *vs.* Leapring, 18 Vesey, 463, the testator directed certain real estates to be sold for not less than £10,000. He then directed that out of the money arising from the sale,

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£3,000 should be expended in buying a benefice for his godson, that £4,000 should be expended in buying certain lands for his nephew. He also gave out of this fund £500 to E., and three other legacies of £100 to three other persons, and he bequeathed the remainder of the fund to F. and G. The land brought only £7,000, and Sir W. Grant held the legacies dependent on the fund and not a charge on the whole estate: 18 Vesey, 463. So in *Mayott vs. Mayott*, 3 Brown's Chancery Cases, 125.

The testator, being a tenant from year to year of a certain farm, directed B. to carry on the farm and invest the net proceeds each year in the government funds, and when E., his nephew, became twenty-one, £1,500 of said proceeds and of the stock and crop, were given to E. The landlord who had given the lease, refused to permit B. to carry on the farm, and the Court held the legacy failed with the scheme.

These cases go upon the plain common-sense rule: that if the testator intend, from the whole will, to give to the legatee a sum of money, it is a general legacy, even though he do point out a specific fund out of which it shall be paid, since it is obvious that he may point out this fund, only because he wishes to add an additional security for the payment, a security upon which the legatee has a specific lien if the general assets fail and general legacies are compelled to abate. But if the testator, by his whole will, show that his intent is to give the money legacy only on condition that the fund will produce it, or if the intent be clear that he intends to give the fund, or a part of it, and that his mind is on the specific thing, and his intent is to dispose of *that*, the legacy is specific.

With these general principles to guide us, let us now consider the will of Mrs. Tennille. She was an old lady and her husband was an old man. They had but one living child. Her property was almost wholly in land and slaves. The bulk of it was a plantation, with stock and slaves upon it, in Quitman county. She directs her house in Columbus to be sold to pay her debts. She then directs that her plantation in Quitman shall be kept up and the slaves worked thereon by

her executors, "*for the purposes hereinafter mentioned.*" After this, she gives the money legacies to the plaintiffs, and adds, immediately, "it is my desire, and I direct the foregoing bequests in this item mentioned shall be paid out of the profits and income of my plantation, *without interest*, whenever my executors shall see proper, and can conveniently spare the same, after paying all expenses necessarily arising from a prudent management of the plantation."

In the next item, she gives a legacy of \$2,000 00 to another legatee, without qualification and without any direction as to how it shall be paid. She next disposes of certain lands and personal estate in Alabama, giving it specifically to the legatees. She then gives all the remainder of her estate, (which is the plantation and slaves directed before to be kept together and worked,) to her son, directing that her husband, who, with his brother, she appoints her executors, shall receive the *annual profits* during his life, in trust, without accountability, for her son; and she directs that he shall preserve *the corpus* for the son.

This is the scheme for the disposition of her property. She disposes of all of it specifically except the legacy to Tennille Patterson. The plantation and slaves in Quitman she designs for her son. But the son is but sixteen years old, and she wishes to provide for her husband and the present plaintiffs out of this, without affecting the *corpus* of it, and how does she do it? She first directs that the plantation shall be kept up, the slaves and stock worked upon it. She *then, after* she has provided a yearly fund *for the purposes* indicated, gives them legacies, and directs them to be paid out of this fund. She contemplates that it may take some time for the fund to furnish the money to pay; she remembers that there will be expenses and uncertainties affecting the profits made on the plantation, and she directs that these legacies, if delayed in their payment, by these expenses and uncertainties, shall *not draw interest*. Can any one for a moment fail to think that if the scheme could have been carried out—if the negroes and stock were now at work under the direction of the

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executors, these legacies would have to await the accumulation of enough to pay them out of the profits, and get no interest in the meantime? If, for instance, there was only a yearly profit of \$1,000 00, could they demand in any year more than that? Is it not plain that it was the intention of the testatrix that these legatees were not to be permitted to demand the sale of any portion of the *corpus* of her estate? If these are general legacies, the legatees would have a right to insist upon their payment as soon as there were funds in hand, after the payment of the debts, to pay them. Is it not clear that this *was not* the intention of the testatrix?

Does not the will show very clearly that she intended to make these legacies dependent upon the ability of this fund to discharge them? In terms she makes *the time* of their payment depend upon this. She contemplates it as entirely within the range of probabilities, that the profits of the plantation *will not* pay these legacies at once, and she directs that they shall not bear interest if they have to be for this reason postponed.

Taking all of this will together, we are of opinion that the testatrix intended this plantation and negroes to go to her son bodily, and that her legacies to the persons mentioned in this item were intended to be specific legacies and dependent upon the success of her scheme of keeping up her plantation and working the negroes thereon.

This scheme has failed. It is impossible to carry it out. We think the legacies fell with it. We think it was her intent that her son should have all of her estate, not specifically bequeathed away, except the legacy to Tennille Patterson, though she intended that if the income arising from the working of the slaves on the plantation should be sufficient to pay these legacies in the fifth item, they should be so paid, but not otherwise. We think this was the clear intent of the testatrix, and that this intent is not only such as subsequent events have shown to be material, but that such intent is plainly made known by the words of her will.

Judgment reversed.

RUFUS KING, plaintiff in error, *vs.* E. C. GREER, executor,
et al., defendants in error.

On the hearing of a bill filed in a claim case, a consent decree was taken that the land levied on should be sold by the sheriff, and that the attorney for plaintiff in execution should pay out of the proceeds of the sale the cost, and a certain amount to the attorneys of claimants. Other property of the defendant in execution was subsequently sold under other judgments against him. On a motion to distribute the money arising from the last sale, the first mentioned judgment being the oldest and not being fully paid by the sale of the land, it was competent for the defendant in execution and plaintiffs in the younger judgments to prove by parol that the consent decree and sale under it were to be a satisfaction of the older judgment.

Money rule. Judgments. Evidence. Before Judge CLARK.
Webster Superior Court. March Term, 1873.

An execution in favor of E. C. Greer, executor of Samuel Griswold, deceased, against Robert Parker, based upon a judgment rendered in Webster Superior Court on September 16th, 1868, brought into Court \$120 00. This fund was claimed by an execution in favor of Rufus King against said Parker, based upon a judgment of the Superior Court of Webster county, dated September 14th, 1863; also, by an execution in favor of James P. Walker, based upon a judgment of the Justice Court of the nine hundred and seventy-eighth district, rendered on August 8th, 1868. Greer, executor, and Walker, alleged that the King execution was satisfied. This question was submitted to the decision of the Court without the intervention of a jury.

Greer, executor, and Walker introduced in evidence the following judgment:

“RUFUS KING *vs.* ROBERT PARKER AND FLORA PARKER
et al., claimants.

“*Fi. fa.*, levy and claim, in Webster Superior Court. Levy on lots two hundred and eleven and two hundred and thirty-eight, in twenty-fifth district of Webster county.

* * * * *

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"J. M. CLARK, J. S. C., S. W. C."

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Hawkins testified, that at the September term, 1872,
Superior Court, when the above judgment was
he did not understand that it was to be a settlement
of the execution to which it related. That he acted for the
plaintiff in taking this judgment, and submitted the draft of
it to Willis A. Hawkins, Esq., the defendant's attorney, for
his approval, before it was signed by the Court. That, prior
to Court, negotiations were instituted which looked to closing
up the whole case, but resulted in nothing, and at Court, this
consent judgment was taken expressing the intention of the
parties.

John Terry testified to substantially the same facts.

Robert Parker, the defendant in execution, testified that his
understanding of the consent judgment was, that it was to be
a settlement of the execution in favor of King; that he re-
ceived this information from Willis A. Hawkins, Esq., his
attorney.

Willis A. Hawkins, Esq., testified, that the execution of
King against Parker was levied upon two lots of land as the
property of Parker; that a bill was filed by Mrs. Parker and
her children, claiming homestead exemption in the land; that
Parker, since the purchase of these lands from King, had

greatly improved them; that Mrs. Parker and her children had also filed a claim to this property; that, under these circumstances, the said consent judgment was taken, and it was understood to be a full settlement and discharge of the execution in favor of King.

The Court held the King execution satisfied. To which ruling Rufus King excepted, upon the following grounds, to-wit:

1st. Because the Court allowed, over the objection of his counsel, the witnesses to state their understanding of the consent judgment.

2d. Because the evidence did not show said execution to have been satisfied.

HAWKINS, GUERRY & HOLLIS, for plaintiff in error.

W. A. HAWKINS; T. H. PICKETT, for defendants.

TRIPPE, Judge.

We do not propose to do violence to the principle of law that parol evidence cannot be received to add to or alter a written contract. We do not think this is such a case. Plaintiff in error claimed money on his execution arising from the sale of property of defendant in execution. Other holders of *fi. fas.* of a younger date against the same defendant, replied to plaintiff's claim, that his *fi. fa.* was satisfied. It appeared in proof that plaintiff's *fi. fa.* had previously been levied on defendant's property, from which sprang litigation and a bill enjoining the levy, etc., was filed. In the progress of that case, a consent decree was taken, finding the land subject and directing its sale on a certain day. The sale did not satisfy the *fi. fa.*, and plaintiff claims this fund on the balance due on his *fi. fa.* On the trial the other contesting creditors proposed to prove that the consideration that induced the consent to the decree was, that it should be in full satisfaction of plaintiff's debt, or, in other words, that plaintiff agreed that if he were permitted to take the decree, it should be as a payment of his

King *vs.* Greer *et al.*

debt. No such condition was expressed in the decree. Plaintiff objected to the admission of the evidence and the Court ruled it in.

If A sued B on a debt which B defended, and the parties agreed that if B withdrew his defense and permitted A to take judgment, A should surrender another claim which he held on B, could not B, in a suit by A against him on the last claim, plead payment or discharge? It would neither be the adding to nor varying a written contract, or the judgment. So if a debtor yield certain property to his creditor, with the power to sell to pay his debt, and it was agreed that it should be a full satisfaction of the claim, would it not be a good payment, and could it not be proven by parol, although the debt is in writing? In this case, the agreement was fully executed. The defendant in execution, who was complainant in the bill, together with his wife and children, consented to the decree, and surrendered the property; the plaintiff in error took the decree, had the property sold and received the proceeds, with the exception of a portion which was to be otherwise appropriated by the terms of the decree. If all this was done under an agreement that the plaintiff's debt was to be thereby fully discharged, it is but right and proper that on a money rule, which is a *quasi* equitable proceeding as between rival creditors, the other creditors should be permitted to prove it without being driven to the delay and cost of filing another bill for themselves and the debtor, to have a reformation, correction, review or new trial on the first bill.

The testimony as to the fact of such an agreement having been made was somewhat conflicting; but the whole question was left to the Judge to decide, and we see no reason to say he decided wrong on the facts.

Judgment affirmed.

THOMSON C. BROWN, plaintiff in error, vs. WILLIAM C. GILL, defendant in error.

1. An affidavit of illegality to an execution having been filed on the ground of want of service, it was incumbent on the defendant to have produced the record of the suit and to have supported the allegations in his affidavit by evidence, the presumption of the law being in favor of the validity of the judgment.
2. It appearing from the evidence that the execution had been assigned by the original plaintiff, in whose name it was then proceeding, to another, who had since died, there being no written evidence thereof, it was not error in the Court to disallow a motion to suggest the death of the transferee upon the record, and to continue the case until his estate was represented.
3. Grounds other than those taken in the affidavit of illegality, cannot be insisted on at the hearing.

Illegality. Judgment. Execution. Practice in the Superior Court. Before Judge CLARK. Lee Superior Court. March Term, 1873.

For the facts of this case, see the decision.

VASON & DAVIS; PHIL. COOKE, for plaintiff in error.

HINES & HOBBS; W. A. HAWKINS, for defendant.

WARNER, Chief Justice.

This was an affidavit of illegality made by the defendant to an execution which had been levied on his property, on the ground that he was never notified or knew of the existence of said suit, and did not know of it until after the judgment was obtained. On the trial of the issue formed on this affidavit, the Court charged the jury, that as the defendant had introduced no evidence to show that he was not served, they were bound to presume in favor of the regularity of legal proceedings, and in the absence of any proof they should find against the defendant. To which charge the defendant excepted. We find no error in this charge of the Court, on the statement of facts contained in the record. It was incumbent on

the defendant to have produced the record of the suit in which the judgment was obtained in order to have supported his allegation in his affidavit of the want of such notice and service as the law requires, the presumption of the law being in favor of the validity of the judgment: Code, 3700, 3705, 3706. On the trial of the issue, the plaintiff, in whose name the judgment was obtained and the execution issued, testified that he had now no interest in the judgment debt, that he had transferred and assigned it since it was in judgment, to Lasseter, to whom he was indebted, and that Lasseter was dead. The defendant then made a motion to suggest the death of Lasseter upon the record, and to have the case continued until the estate of Lasseter was represented. This motion the Court overruled, holding that the case could well proceed in the name of the original plaintiff in the judgment for the use of the estate of Lasseter, to which ruling the defendant excepted. The defendant, in his affidavit of illegality, did not allege as one of his grounds of illegality to the execution, that it was proceeding against him in the name of an improper party, or that the plaintiff had no interest in it; nor did he propose to amend his affidavit of illegality so as to include that ground, and therefore that was not one of the questions in issue and on trial, and the evidence as to that question was irrelevant to the issue made by the defendant's affidavit of illegality to the execution. But, in our opinion, the original plaintiff in the judgment in this case could collect the same from the defendant therein, and when paid by him such payment will be a sufficient protection against that judgment. We are unable to see what interest it is of the defendant, or how it should concern him, as to what may be the rights of Lasseter's estate in the judgment and execution. When the defendant pays off the execution to the sheriff he will be protected, and if the judgment and execution was the property of Lasseter at the time of his death, then the plaintiff therein, if he receives the money, will hold it in trust for the benefit of Lasseter's legal representatives; that, however,

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was a question entirely outside of the issue made by the defendant's affidavit of illegality.

The legal title to the judgment and execution being in the plaintiff named therein (there being no written evidence of any assignment thereof,) when the defendant shall pay the amount due thereon to the sheriff, with ten per cent. damages for delay in bringing the case to this Court, he need not give himself any further trouble about the claim of Lasseter's estate to the judgment, or its legal representatives.

Let the judgment of the Court below be affirmed, with damages.

WILLIAM M. PETERS, plaintiff in error, vs. JESSE J. BRADFORD, sheriff, defendant in error.

A sheriff having in his hands an execution against B., founded on a debt contracted since 21st of July, 1868, sold property of the defendant for about \$8,000 00. P. having an older judgment, obtained in 1866, for about \$1,000 00, gave the sheriff notice and claimed that much of the money. The sheriff paid to the younger judgment \$2,000 00 of the money, and retained \$1,000 00 in hand to answer the judgment of P., and P. ruled the sheriff for the amount of his judgment. Pending this rule, the defendant, who had procured this money to be set apart as an exemption by the Ordinary, claimed the money:

Held, That it is error in the Court to hold that the defendant was entitled to the money as an exemption as against the *fi. fa.* of P. P. is not estopped from insisting on his right to the \$1,000 00, because he has failed to require the sheriff to bring into Court the whole amount raised at the sale.

Judgment. Execution. Homestead. Sheriff. Before Judge JAMES JOHNSON. Muscogee Superior Court. October Term, 1872.

Judgment was rendered in the Inferior Court of Muscogee county, at the March term, 1866, in favor of William M. Peters, against one James F. Winter, for \$508 77, principal, and \$190 05, interest to date of judgment, and costs. The

execution issuing therefrom was levied on November 4th, 1868, on lot one hundred and ninety-six, in Columbus, but no sale was made thereunder. At the May term, 1870, of Muscogee Superior Court, judgment was rendered in favor of F. L. Brockett for the use of Mathews against said Winter, for \$2,350 40 principal, \$449 29, interest and costs. The execution issuing therefrom was levied on March 4th, 1871, on lots one hundred and ninety-six and two hundred and eighty-two, in the city of Columbus, and subsequently, on March 27th, 1871, on certain property in the village of Wynnton.

Lot two hundred and eighty-two was sold at April sales, 1871, for \$1,000 00. Lot one hundred and ninety-six, and the Wynnton property were sold at May sales, to Henry L. Benning and E. S. Worrill, Esqs., the attorneys for Brockett, the first for \$1,400 00, and the latter for \$1,100 00. Notice was served upon Jesse J. Bradford, the sheriff, of the claim of any moneys that might come into his hands from the sale of the defendant's property, on the Peters' execution. Payment of said execution was demanded from him out of said moneys, after said sales. Upon refusal, he was served with a rule *nisi*, reciting the foregoing facts, and requiring him to show cause why he should not satisfy said *fi. fa.*, to which he answered as follows:

On the 26th of May, 1871, he, as sheriff, conveyed said lot number one hundred and ninety-six, to Henry L. Benning and E. H. Worrill, and, also, said lot in Wynnton; that they were the attorneys for the plaintiff in *fi. fa.*, Brockett vs. Winter; and that by their direction, he credited the amount of their bids, viz: \$2,500 00 on said *fi. fa.*; that said *fi. fa.* is still unsatisfied; that the expenses of the sale was \$40 50, which he claims shall be paid out of the money in his hands, raised from the sale of lot number two hundred and eighty-two. He has in his hands a cost *fi. fa.*, Officers of Court vs. James F. Winter, bearing date 31st July, 1869, which cost *fi. fa.*, by consent of all the attorneys, he has paid out of the money in his hands; that he has in his hands \$970 50, part of the \$1,000 00, for which he sold lot number two hundred and

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eighty-two; that the rest of that sum has been applied by him to the payment of advertising, costs and commissions for selling the lot number two hundred and eighty-two. He further says that said Benning and Worrill claim each a lien on said money for their fees, amounting to \$300 00 each, and that he has paid to said Worrill, on account of his fees, \$150 00; to said Benning, on account of his fees, \$100 00. He further says that the Ordinary of Bibb county had set apart as exemption of personalty, for the said J. F. Winter, the said money above mentioned, so in the hands of this respondent, and had ordered him to hold said money subject to the order of said Ordinary, to be invested in personal property on account of said James F. Winter and family, under the laws of this State; that a certified copy of said proceedings is herewith shown to the Court, and the said Winter claims said money under said exemption. He further says that the said Winter has given notice to this respondent not to pay over the said money in his hands due on said *fi. fa.* of Peters, because the said *fi. fa.* is null and void. He further says that there was a rule pending against him, in favor of said Brockett, for the use, etc., *vs.* said Winter, for the money; and that the said Peters made himself a party to said rule; and that the question was decided against him (said Peters) in this Court, and was then carried by him to the Supreme Court; and that the decision of this Court was reversed, and the case sent back here; and that the same was withdrawn by plaintiff at the last term. He further says, that at the time when said Peters made himself a party to said rule, and when the same was decided, he claimed only the money received from the sale of lot number two hundred and eighty-two, though he had previously notified this respondent to hold the other money, and set up no claim to the money raised from the other two lots; and that he in consequence settled with said Brockett's attorneys, and credited the *fi. fa.* with the amount for which said two lots sold; and that this rule of Peters against him was not taken until long after said settlement.

Peters traversed the answer of the sheriff. The issue thus

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formed was submitted to the Court without the intervention of a jury.

L. T. Downing, in behalf of Peters, testified, that as attorney of plaintiff, he had never relinquished the claim of his client to be paid his execution against James F. Winter out of any and all moneys received by said sheriff from sale of property of said Winter, on and after April 4th, 1871; that not until after it was done, did he know anything of the payment by the sheriff to the attorneys of the Brockett *fi. fa.*, against said Winter, of the proceeds of sale of lot number one hundred and ninety-six, and of the Wynnton property, (\$2,451 75;) that he did not consent to it when it was done, nor at any time afterwards; that when, in June, 1871, Brockett, by his attorney, moved his rule against the sheriff for proceeds of sale of city lot two hundred and eighty-two, plaintiff, (Peters) by witness, was made a party to said rule and contested with Brockett for the money in controversy under said rule; he did not then set up a claim to be paid in behalf of his client out of the other moneys raised from Winter's property by the sheriff, because the money then in controversy under said rule was sufficient to satisfy the execution of his client, but never intended, by so making his client party to said Brockett rule, to waive his client's lien or give up his right to claim payment out of the other money received by the sheriff, and which he then was advised had been paid over to the Brockett *fi. fa.*, nor did he intend by so making his client party to said Brockett rule, to consent, in any way, or be considered as consenting to said payment of \$2,451 75, or to sanction the same; that, at the time he made his client a party to said Brockett rule, he knew, from the entries on the Brockett *fi. fa.*, of said payment of \$2,451 75; that he was willing to prosecute the rights of his client to the proceeds of sale of lot number two hundred and eighty-two, under said Brockett rule, and not to press his client's lien upon the proceeds of the other property, believing that the money then in controversy was enough to satisfy plaintiff's *fi. fa.*, and so was willing not to move, and did not move, for satisfaction out of the proceeds

of the other property of Winter raised by the sheriff. At the June term of the Court, 1872, after the case had come back from the Supreme Court, was desirous of prosecuting, and did move to prosecute, the rights of his client under the said Brockett rule, when, on the case being called, Brockett, by his attorney, withdrew said rule, whereupon, he moved the present rule; that, after having made his client a party to said Brockett rule, the sheriff made application to him in behalf of Mr. Benning to consent to his letting Mr. Benning have \$100 00 of the money in controversy under said rule, on account of fees; that he consented to this with the express understanding that if said \$100 00, or any part of it, should be needed to satisfy the judgment in favor of his client, it must be refunded; that, afterwards, Mr. Worrill made personal application to witness to consent for the sheriff to let him have \$150 00 out of said money, to which he consented, with the same stipulation as that relating to the money obtained by Mr. Benning.

Said Peters and said Brockett *fi. fas.*, with entries thereon, were considered in evidence.

Henry L. Benning testified that he had received from said sheriff, on account of fees, \$100 00, and had no knowledge of the stipulation about refunding it referred to by Mr. Downing. He put in evidence said *fi. fa.* in favor of Brockett, with the entries thereon, and also the said rule brought by Brockett against said sheriff, at May term, 1871. He said that he claimed out of said money \$300 00 as fees for himself, \$300 00 for Mr. Worrill, less the sums above named, and that he thought the fees reasonable.

The certificate of exemption referred to in the answer of the sheriff was considered in evidence.

The Court held that Peters had abandoned his lien on said \$2,451 75, and was therefore postponed to the Brockett *fi. fa.* as to said money; that the \$1,000 00, or proceeds of sale of lot two hundred and eighty-two should be paid over to Winter as his exemption; and that the rule against the sheriff be discharged. To this decision Peters excepted.

L. T. DOWNING, for plaintiff in error.

HENRY L. BENNING ; PEABODY & BRANNON, for defendant.

McCAY, Judge.

As against Peters, the defendant in the *fi. fa.* was not, under the decision of the Supreme Court of the United States, in the case of *Gunn vs. Barry*, entitled to this money. Peters' debt was contracted before the 21st day of July, 1868. The record does not show when the debts, on which the other (Brockett's) judgment was founded, was contracted. But we do not think that material. There is nothing in the record to show any such affirmative waiver by Peters of his right to be paid out of the money raised at the second sale, as charges him with *laches*, and as estops him from insisting on his legal right to the money actually in hand. When he moved his rule he had no call to go upon the sheriff for any more of the fund than would pay him. Perhaps, if defendant in the judgment had interfered before the money was paid out to Brockett's *fi. fa.*, and insisted that Peters should go on that fund, because he, Peters, had two and Winter but one, he might have been compelled to do so. But Winter is just as much in fault in not stopping the sheriff as Peters is, and we can see nothing to justify setting Peters, who has a superior lien, aside for Winter. Had Winter's claim been superior to Peters', we are not so sure that the sheriff would be liable to Peters. He kept enough in hand to pay Peters ; but that is not in the case as it now stands.

Nor do we decide anything as to the amount of money now in hand. The Judge did not, as we understand the record, settle the question as to whether the money paid to General Benning and Judge Worrill was by consent of Mr. Downing, so as to lessen the fund for which the sheriff is liable; that is a question of fact turning on the evidence. The rule ought not to have been discharged. It is, in our judgment, still open.

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If Mr. Downing only consented on condition that the fund was not reduced below the amount of his claim, the sheriff who had the money in hand and knew the amount, or was bound to know the amount of the *fi. fa.*, ought not to have paid it, or paid it on condition that it should be returned, if needed, to pay Peters.

Judgment reversed.

W. R. SKINNER *et al.*, plaintiffs in error, vs. ALLEN, PREER & ILGES, defendants in error.

The evidence being conflicting and the Judge trying the case having refused a new trial, this Court will not interfere, as there is sufficient evidence to support the verdict.

New trial. Before Judge JAMES JOHNSON. Muscogee Superior Court. November Term, 1872.

Allen, Preer & Ilges, brought assumpsit against W. R. Skinner and L. Skinner, upon the following account:

W. R. SKINNER and L. SKINNER,

1869.

In account with ALLEN, PREER & ILGES:

June 18th.	To discount your note (draft) due 18th October,	\$434 00
July 8th.	" " " " " 1st November,	108 60
July 19th.	" " " " " 1st November,	342 29
October 22d.	Paid your bill with Preer & Ilges.....	217 86
		<hr/> \$1,102 72

Cr.

October 27th.	By cash through Mr. C. Gachet, to pay your drafts, dated June 18th, and July 19th.....	777 29
		<hr/> \$326 43

The defendants pleaded the general issue, set-off and payment. The evidence as to whether the account had been paid was conflicting in the extreme. The plaintiffs made out a *prima facie* case by swearing to its correctness. A draft was presented to Mr. Allen by defendants, dated June 10th, 1869,

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signed by W. R. Skinner and L. Skinner, addressed to the plaintiffs, payable four months after date, for \$325 50. Upon this paper the entire controversy turned. Mr. Allen testified that it was sent to plaintiffs by W. R. Skinner, as collateral security for the payment of goods to be furnished defendants; that the goods were sent and are embraced in the account against Mrs. L. Skinner, dated July 30th, 1869, for \$217 83, in favor of Preer, Ilges & Company, which was paid by plaintiffs; that he cannot tell how this draft came into the possession of the defendant. On the other hand, W. R. Skinner testified positively that this draft was sent to the plaintiffs and they were to return goods, but that the goods embraced in the bill to Preer & Ilges, referred to in the account sued on, are all that were ever received by defendants; that he paid this draft to Mr. Allen himself; that the balance of his indebtedness was paid by Mr. Gachet; that there is now nothing due to the plaintiffs. Other testimony was introduced unnecessary to be set forth.

The jury found for the plaintiffs. The defendants moved for a new trial because the verdict was contrary to the evidence. The motion was overruled and the defendants excepted.

PEABODY & BRANNON, for plaintiffs in error.

INGRAM & CRAWFORD, for defendants.

TRIPPE, Judge.

The draft, which was the matter of contest, was drawn by the husband and wife since the Act of December, 1866. It did not appear that the wife executed the paper as security for her husband, or that it was drawn to pay his debts. In fact it appeared that she was the beneficiary of some of the transactions of which this draft formed a part. The wife should be protected against any control or power that the husband may wrongfully exercise over her that involves her

separate estate, especially if known to the creditor. But nothing of this sort is charged in this case.

The evidence was conflicting on the question of payment. There was testimony to support the verdict had it been either for plaintiffs or defendants. The jury has passed upon it, and the Judge trying the case refused to interfere, and though the testimony of the defendant himself is somewhat more positive in its terms than that of plaintiff, yet, upon the whole, we do not feel constrained to set the verdict aside.

Judgment affirmed.

PLEASANT H. WHITAKER, plaintiff in error, vs. WILLIAM J. DAVID, defendant in error.

The Act of 1871, Code of 1873, section 8741, authorizing the plaintiff in execution, where a "claimant" has withdrawn his claim, to go to the jury and recover damages, "in case it is made to appear that the claim was interposed for delay only," is not retroactive, so as to apply to claim cases then pending, it not appearing that any previous claim of the same property had been put in and withdrawn by the claimant.

' Claim. Damages. Before Judge JAMES JOHNSON. Harris Superior Court. April Term, 1873.

An execution in favor of Grief W. Epps against John M. Granberry, principal, and Tomlinson F. Brewster, security, which had been transferred to William J. David, was levied on May 1st, 1867, on five hundred and twenty acres of land, situate in the county of Harris. This property was claimed by Pleasant H. Whitaker on June 4th, 1867. The issue thus formed came on for trial at the April term, 1873, when, after the evidence had been introduced and the jury charged, the claimant withdrew his claim. The plaintiff in execution insisted on proceeding for damages. The claimant objected. The objection was overruled and the claimant excepted.

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The Court then charged the jury, "that they should determine from the evidence whether the claim had been interposed frivolously and for delay only, and that in connection with the testimony they might take into consideration in determining the question of fact that the claimant had withdrawn his claim." To which charge the claimant excepted.

The jury returned a verdict for the plaintiff in execution for \$222 53 damages.

Error is assigned upon each of the aforesaid grounds of exceptions.

JAMES M. MOBLEY; BLANDFORD & CRAWFORD, for plaintiff in error.

INGRAM & CRAWFORD, for defendant.

McCAY, Judge.

The Act of 1871, giving to the plaintiff in execution the right, when a claim is withdrawn, to go to a jury on an issue that the claim was interposed for delay, and seek the damages provided in such cases by the claim laws, is not, in its terms, retroactive, so as to apply to claims then pending. True, the language is broad enough to cover such cases; but the rule is well settled that we are not to give a retroactive operation to an act, unless that is the plain intent. This is especially the case when to give it that construction would be to make it divest a vested right, or to operate so as to impose a penalty for an act already done. We think this act would so operate, if it is to be taken as applying to claims then pending.

The damages authorized to be given in a claim case are *penalties*. They do not turn on the *actual* damage received by the plaintiff. They *must* be ten per cent., and, may be, such other higher per cent. as to the jury may seem reasonable and just. It may be that the *plaintiff* is not, in fact, damaged. The property may still pay his debt, with the interest, during the pendency of the claim. The real damage in such a case is to the defendant in execution. But the law

declares that if a claim is interposed for delay only, it shall be the duty of the jury to *punish* the claimant, at any rate, by ten per cent., and by more, at its discretion. And this is plainly entirely independent of whether the delay has been, in fact, a greater damage than is compensated by the interest.

If the Act of 1871 is only to be understood as authorizing the plaintiff to go to the jury and recover his *actual damage*, the objection would not apply, since that would only be giving him a new remedy for a right he already had. But the Act of 1871 evidently intends the damages, penalties, allowed against a claimant who has put in a claim "for delay only," which damages turn, as we have said, not upon the actual hurt the plaintiff has suffered, but on the *good faith* of the claimant.

When this claim was put in, the plaintiff was not liable to this *penalty*. He was only liable to a suit for the *actual damage*, and this is sometimes great. I have known a wagon and team worn out during the pendency of a claim, and the defendant insolvent. The effect of the Act of 1871 is to impose a penalty, not simply a new remedy for actual damage, and it cannot have a retrospective operation. To so construe it, would make it a technical *ex post facto* law, prohibited both by the State Constitution and the Constitution of the United States.

Judgment reversed.

SEABORN WADFORD, plaintiff in error, vs. ROBERT RHODES,
defendant in error.

The evidence being conflicting, and inasmuch as the Court refused to allow the defendant to be recalled to prove a fact inadvertently omitted, the discretion of the Court below in granting a new trial will not be controlled.

New trial. Practice. Before Judge GOULD. City Court of Augusta. February Term, 1873.

Wadford brought complaint against Rhodes for \$720 00, the balance due upon an account for cantaloupes sold, after allowing credit of \$100 00. The defendant pleaded the general issue. The real defense relied upon was that the defendant purchased the cantaloupes for a man by the name of Bryant, disclosing the name of his principal at the time of the contract. Upon this point the testimony was exceedingly conflicting.

It appeared that on the day of the last shipment of cantaloupes, \$100 00 was paid to plaintiff on the account, but whether by defendant or Bryant the evidence is again conflicting. The plaintiff testifies that the payment was made by defendant, but Bryant states that the money, though taken from defendant's drawer in his office, belonged to him, Bryant.

Pending the concluding argument of plaintiff's attorney, a controversy having arisen as to the proof upon the point as to in whose money the above payment was made, counsel proposed to recall defendant to show by him that it was Bryant's money, stating that he had been of the opinion that such proof had been made, and that his failure to interrogate the defendant upon this point was an inadvertent omission. This the Court refused to permit, and defendant excepted.

The jury returned a verdict for the plaintiff for \$545 68. The defendant moved for a new trial on the ground of the above exception, and because the verdict was contrary to the law and the evidence. The motion was sustained, and a new trial ordered; whereupon the plaintiff excepted.

JOHN T. SHEWMAKE, for plaintiff in error.

HOOKE & GARDNER, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendant to recover the value of a lot of cantaloupe melons. On the trial of the case, the jury found a verdict for the plaintiff.

The Underwriters' Agency *vs.* Seabrook.

A motion was made for a new trial, on the ground that the verdict was contrary to the charge of the Court, contrary to the weight of the evidence, and because the Court refused to allow the defendant to be recalled during the argument of the case to prove whose money the \$100 00 was in the drawer, given in part payment for the melons, the defendant's counsel stating that he thought he had proved that fact, but as it seemed he had not, the omission was inadvertent, and he desired then to be permitted to make the proof. The Court granted the new trial; whereupon the plaintiff excepted.

The main question in the case, was whether the plaintiff sold the melons to the defendant on his own account or as the agent of another party, and whether the name of the other party was disclosed to the plaintiff by the defendant at the time of the sale. On this point the evidence was conflicting. In view of the evidence disclosed in the record, and inasmuch as the Court refused to allow the defendant to be recalled to prove the fact inadvertently omitted, as before stated, we will not control the discretion of the Court below in granting the new trial in this case.

Let the judgment of the Court below be affirmed.

THE UNDERWRITERS' AGENCY, plaintiff in error, *vs.* EDWARD SEABROOK, administrator, defendant in error.

Where a bill was filed against an insurance company to make them liable for certain cotton lost by the sinking of a steamboat, on the ground that their agent had fraudulently misled the owners, so as to induce them to believe that the cotton was insured by the company; and the evidence showed that the agent, for whose act the company was sought to be charged, was the agent of several other insurance companies engaged in the same business at the same place, and there was nothing in the proof to show for which of the companies the agent was acting at the time he did the acts from which the fraud was sought to be inferred:

Held, That a verdict against the company was illegal, and without evidence to support it, and it was error in the Court to refuse a new trial.

The Underwriters' Agency vs. Seabrook.

Insurance. Principal and agent. Before Judge JAMES JOHNSON. Muscogee Superior Court. October Term, 1872.

In February, 1866, Lloyd G. Bowers, in behalf of Edward Seabrook, administrator upon the estate of George O. Dawson, deceased, applied to DeWitt F. Wilcox, in Columbus, Georgia, the agent of the Underwriters' Agency, for insurance on one hundred and ten bales of cotton, which risk, in behalf of the Underwriters' Agency, Wilcox refused to take.

Bowers then wrote a letter to Y. G. Rust, as follows :

"COLUMBUS, February 6, 1866.

"Y. G. RUST, Esq.—*Dear Sir:* Will you please find Mr. Oliver Cromwell and get particulars of him how he ships two lots of cotton to Apalachicola, (one of fifty bales, the other of sixty bales,) and insure them to Apalachicola. Send bills to me and I will remit by express. Mr. W. Cromwell expected me to insure, but found out, after his son had left, I could not. Your prompt attention will oblige

"Yours, L. G. BOWERS.

"How is your cotton market? Market dull here. Middlings, thirty-eight cents. Is there much in your section?"

To which Rust responded as follows :

"ALBANY, February 9, 1866.

"L. G. BOWERS, Esq., Columbus—*Dear Sir:* Your favor of the 6th instant is received. Mr. Cromwell is now shipping sixty bales of cotton by steamer 'White Rose,' now loading at this place. The other fifty bales he will not be able to get off in time for the boat, but will ship next week. The treasury agents have seized one bale of his cotton, the producer being a subscriber to the cotton loan. Middling cotton worth, to-day, thirty-five cents. Yours truly,

"Y. G. RUST."

The steamer White Rose sunk on the 19th February. Oliver Cromwell, on the 21st February, called on Y. G. Rust

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"to make arrangements about collecting the insurance or to take initiatory steps thereto." Rust remarked, "why your cotton is not insured," etc. Bowers and Rust were insurance agents, Bowers in Columbus and Rust in Albany, of the *Ætna* and *Home*. Wilcox in Columbus, and Rust in Albany, represented the Underwriters' Agency. After this Seabrook, administrator as aforesaid, through his agents, took charge of the cotton, shipped it to Apalachicola, sold part as damaged, shipped part to Liverpool, received proceeds of sale on 5th April, 1866, and on the 13th April, 1866, filed a bill *versus* Y. G. Rust and the Underwriters' Agency, charging the latter with constructive fraud in inducing him, Seabrook, to believe his cotton was insured in that company, in consequence of which he failed to take out other insurance. The charges in his bill are:

1st. That he applied through his agent, Warham Cromwell of Columbus, to Lloyd G. Bowers of the same city, to insure said (one hundred and ten bales) cotton; that Bowers replied he could not take the risk himself as the cotton was not in his district, but that he would get it taken by Yewell G. Rust, of Albany, *the agent of the Underwriters' Agency*; that Bowers wrote the letter before set out to Rust and received the reply hereinbefore set forth, which Bowers considered as an insurance of the cotton, and so informed complainant, who rested satisfied that his cotton was insured.

2d. That he, Rust, afterwards acted on this letter in respect to the lot of fifty bales, which he not only did insure as agent of Underwriters' Agency, but made out all of his charges, *including the premium of insurance against Bowers*.

3d. That complainant, for these reasons, reposed full confidence in Rust, as agent of the Underwriters' Agency, that he would insure said cotton, and that his omission or neglect to do so was contrary to the legal and equitable duty of said company, and caused to complainant the loss of his cotton.

In addition to the letters at the trial, complainant introduced L. G. Bowers, who testified, that he did not write the letter to Rust as agent of the Underwriters' Agency; that he

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did not have said office, or any other, in his mind; that he merely wrote to Rust because he knew that he was the agent of several companies; supposed that Oliver Cromwell would attend to getting certificates of insurance; that he should have called on Rust for that purpose.

Warham Cromwell, agent of complainant, testified: Bowers said he could not insure the cotton in Albany, as Rust represented at that point the companies represented in Columbus by him, Bowers; that he would see Wilcox, the agent of the Underwriters', and endeavor to get insurance; if he failed, that he would write to Rust and instruct him to insure; that he did apply to Wilcox, agent of Underwriters, who declined the risk, and he had written to Rust, by mail and express, instructing him to insure the cotton; witness saw the letter written by Rust to Bowers, and was fully and entirely satisfied the cotton was insured and so informed complainant.

Oliver Cromwell testified, that all that occurred between him and Rust in regard to the sixty bales was that Rust showed him Bowers' letter, and he told Rust how he was shipping; did not request insurance in any particular company.

Y. G. Rust testified, that he did not represent any insurance company when he had read the letter to Cromwell, or when he wrote the reply; that he was agent, at the time, for the *Ætna*, the *Home* and the Underwriters' Agency, and as Cromwell neither advised him of the marks, values or completeness of the shipment, he did not even know what cottons were shipped on the "*White Rose*," or that he was looked to for insurance until after the wreck.

Both Rust and Cromwell testified that the fifty bales were insured on a special and separate application by Oliver Cromwell for insurance in the Underwriters' Agency; that the premium, \$217 00, was paid in cash at the time, and certificates of insurance delivered.

The Underwriters' Agency introduced no evidence.

Before charging the jury, the Court inquired of complainant's counsel if he sought to have a decree against defendant,

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Rust. He replied that he did not. This occurred in presence of the jury. The Court then charged:

1st. That in this proceeding no decree could be rendered against Rust.

2d. That if the defendant, by its agent, induced the plaintiff or his agent to believe that his cotton had been insured, when, in fact, it had not, and if so believing, the plaintiff had not insured, and the cotton was lost, as alleged by plaintiff, said defendant became liable to plaintiff, and the measure of the liability was the value of the cotton believed to be insured at the time the same was lost, with interest thereon to the time of the trial.

To which charge defendant excepted.

The Court, at the request of defendant, charged the jury:

"If Rust was agent of other companies as well as defendant's, and the proof does not show that Rust was dealing with complainant as agent of defendant, complainant cannot select out of the several companies represented by Rust the Underwriters' Agency, and so fix the liability on it, rather than some other company which Rust represented."

Upon these charges and evidence a verdict was rendered against the Underwriters' Agency for \$13,015 00.

Defendant moved for a new trial, because the Court erred in its charge, because the verdict was contrary to the law, as given in charge, and without evidence to support it. A new trial was refused, and defendant excepted.

R. J. MOSES, for plaintiff in error.

HENRY L. BENNING, for defendant.

MCCAY, Judge.

It must be remembered that the complainant's case in this bill cannot stand upon any *contract* to insure. Contracts of insurance must be in writing: Code of 1873, section 2794. To justify a verdict for the complainant, it must appear that by the conduct of the company's agent it has been put in such a

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situation as that it is liable for damages for his act, or for his failure to act. It is not sufficient that the agent, as an individual, has done something for which he would be liable; the act proven must be some act of the agent representing the company. If, for instance, the evidence shows that Bowers wrote to Rust, as a *friend*, asking him to see Cromwell, get the marks and the mode of shipment of the cotton, cause it to be insured and draw on him for the premium, and if Rust undertook to do so and failed, and so misled the complainant as to prevent him insuring, in fact, then, however, Rust might be chargeable, the company would not be. The basis of the right to recover is, that the acts which misled, if there were such acts, must be Rust's acts as the *agent of the Underwriters' Company*. As the case went to the jury—there being a disclaimer of any verdict against Rust—to justify the verdict it must have been shown that Rust did certain acts *as the agent* of the defendant; that those acts were of a nature calculated to lead them to believe the sixty bales of cotton were insured by Rust, as the *agent of the defendant*, and that they did so believe, and failed to insure in fact.

We do not think there is *any* evidence in the record to justify the verdict, to make out these necessary ingredients of a case for the plaintiff. It appears that Rust was the agent, taking river insurance for *three* companies, and that he was also a warehouseman, having cotton in store for this very plaintiff. Two of these companies were represented at Albany by Rust, and at Columbus by Bowers. The Underwriters' was represented at Columbus not by Bowers but by Wilcox. The plaintiff applies to Bowers (not the agent of defendant.) Bowers declined, because, to take the insurance would be to interfere with the Albany agency of those companies which he represented at Columbus, and Rust, at Albany. As the plaintiff was an old customer and friend, he, however, made himself busy to get the cotton insured. He applied to Wilcox, the defendant's agent at Columbus. Wilcox declined. He had told the plaintiff that if he failed with Wilcox he would *instruct* Rust to insure; and he wrote to

Rust the letter of the 6th of February. Naturally one would suppose, as this was a letter from one agent of these companies to another agent of the same companies, that if Bowers was writing to Rust as an insurance agent at all it was as agent of his own companies. But he does not, in terms, address Rust as an insurance agent at all, nor does he write as an agent. His letter is to Rust as an individual, and he signs it as an individual, and he testifies that he did *not have any particular company* in his mind when he wrote; and, doubtless, that was the fact. He intended to ask Rust to insure in any company he might see fit, and Rust would have fully complied with his request as well as with the intimation contained in his reply to that request, if he had insured in *any* of the companies he represented, or in any other good company represented by some other person at Albany. Nor is there in Rust's reply anything to show that he was acting as agent of the defendant. He writes as an individual. He signs his name Y. G. Rust, with no affix of agent for anybody. It is giving, too, a very large effect to Rust's letter to infer from it that he promises to insure at all. He acknowledges the receipt of Bowers' letter, and says that Mr. Cromwell is shipping sixty bales by the steamboat, and will ship the balance in a short time, but he does not say he will insure as Bowers had requested. It is very probable that Bowers did think from this that Rust would do as he requested him. But this thought is not founded on any promise in the letter, but is only an inference founded in the relations between him and Rust as friends, knowing each other and having confidence in each other. Certainly there is nothing in the letter of Rust to justify an inference that Rust would insure as agent of the *Underwriters' Agency*. So much for the letters of Bowers and of Rust. Rust showed Cromwell Bowers' letter, and Cromwell gave to Rust the marks of the cotton, sixty bales, and informed him that they were on board the steamboat.

We think it very probable that Cromwell supposed Rust would insure them from this act, though it would be going

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very far to hold Rust bound, even as an individual, for damages for not insuring. He was under no *obligation* to do it. His undertaking, if he did undertake, was gratuitous, and if he is liable at all, it is only because Cromwell, trusting to this, took no further steps. Can any one think, if Cromwell had been instructed by his father to insure, (he says he was not,) that he would have been satisfied as the matter stood.

But there was nothing said by Rust to Cromwell, nor by Cromwell to him, to indicate that Rust, in showing Bowers' letter and in getting the marks of the cotton, was acting as the agent of the Underwriters' Agency. Cromwell says distinctly that nothing of the kind occurred. It is true that in one of his answers he does say that no other company was mentioned but the Underwriters' Agency. But it is plain that, in this, he is referring to the fifty bales insured in that company, in March, since he says several times that at the interview in February, when Rust showed him Bowers' letter, and he gave the marks of the cotton, nothing was said as to what company it was to be insured in. Is not the presumption just as strong that it was to be insured in the Home or Ætna as in the Underwriters'? Nay, is not the inference just as strong that, in getting these marks, Rust was not acting as the agent of any of the insurance companies, but as a warehouseman, and as the agent of the plaintiff?

We do not think the fact that the fifty bales was, after the first lot was lost, (after Rust had refused to recognize it as insured, and repudiated the inference they sought to draw from his letter of the 6th of February, and his conversation on that day with Cromwell, taking the marks, etc.) has any thing to do with this suit. It seems to us absurd to say that because Rust, in March, on the special application of Cromwell, to insure the fifty bales in the Underwriters', did so insure it, receiving from him the premium in cash, is to be held as acting as the Underwriters' Agency, in his letter of the 6th of February, and in his acts of that date, as testified to by Cromwell. Had he, on the application of Cromwell, insured this fifty bales in the Home or Ætna, would that have shown he

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was, on the 6th of February, acting for the Home or Ætna? The only use that can be made of this insurance in March is, to show that Rust, in agreeing to look to Bowers for his storage, did so in view of Bowers' first letter. But this does not throw *any light* on the question as to whether Rust was acting for the Underwriters' when he spoke to Cromwell on the 6th of February, and when he wrote the letter of that date to Bowers. If it indicates anything it is that Rust was acting as a warehouseman, because, in insuring the fifty bales, he gets and credits the *cash* for the insurance, and charges Bowers with the *storage*.

It is undoubtedly true that Mr. Rust's conduct and his testimony does not, in view of what the other witnesses say, appear to be quite free from blame. We are not prepared to say that the evidence, taken altogether, does not show that when he spoke to Cromwell, and when he wrote the letter of the 6th, he did intend to insure both lots of cotton; but we are very clear that the evidence does not show that, *as agent of the defendant*, he undertook to do so. Had he insured both lots in the Home or Ætna, or had he gone to some other insurance agent and insured them in some company he did not have anything to do with, he would have done everything Bowers requested him to do, everything Cromwell thought he was about to do, and everything Bowers supposed, from his letter of the 6th, he had done. Under such a state of facts, it seems to us that it is entirely gratuitous to charge the Underwriters' with the *damages* flowing from Rust's failure to comply with Bowers' request.

Had Bowers written to Rust as agent of the Underwriters', and Rust showed Cromwell such a letter—had Rust replied *as* such agent—had Rust been the representative of no other company doing that kind of business—the verdict might have been sustainable, though, even then, it would have been an *extreme* case.

If, when the law requires a contract to be in writing—men *trust* to mere words—it ought to be a strong case to make a

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principal liable for the act of his agent in promising, by parol, to do that which, when done, must be done by writing.

Judgment reversed.

HENDERSON TAYLOR, plaintiff in error, *vs.* JAMES R. MARTIN, defendant in error.

There was no abuse of the discretion of the Court in refusing to grant a new trial in this case.

New trial. Evidence. Before Judge ROBINSON. Morgan Superior Court. November Term, 1872.

Martin brought case against Taylor for malicious prosecution, claiming \$2,000 00 damages. The defendant pleaded not guilty. Plaintiff introduced an indictment charging him with having enticed away laborers in the employment of defendant, upon which appeared his name as prosecutor. J. T. Patterson, one of the grand jury who found the true bill, testified that the defendant was examined before said jury as the prosecutor. It was shown by the subpoena docket that the defendant had caused subpoenas to be issued for the prosecution. It was admitted that he employed counsel to represent the State, and that the plaintiff was tried on said indictment and acquitted. The Solicitor General, Mr. Jordan, testified that the defendant was present, counseling and advising at the trial. The plaintiff testified that he did not entice away the servants named in the indictment (Jerry Allen and Nat Allen) from the employment of the defendant. That defendant told him, in the latter part of December, 1870, after inquiring what rates Poulaine was paying for hands, that he would pay no such rates; that he would suffer his land to grow up in briars first. That plaintiff was employed as agent by Poulaine for 1871, to attend to his plantation, and was not employing hands for his own use. That

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he was authorized to and did look up hands for his employer. That he did not tell James Almond, in January or February, 1871, at plaintiff's house, on Poulaine's plantation, that the negroes named in the indictment had told him before he employed them that they were under a verbal contract to live with the defendant for the year 1871, and that they did not wish defendant to know that they were going to leave, for if he did he would not settle with them. Did not tell Almond that he, plaintiff, had hired or contracted with the negro hands; but did tell him, in May, 1871, that said negroes told him that they had had a contract with the defendant, and that he would not settle if he knew they were going to leave. Plaintiff and his family are dependent upon his labor for a support; he has not been discharged by Poulaine, but is still living with him in same capacity as in 1871. His counsel charged him \$25 00 for defending him upon the criminal trial.

Antoine Poulaine testified, that he hired the negroes named in the indictment about Christmas, 1870, or early in January, 1871. That plaintiff, as his agent, was looking up hands for him before and about that time. That he told the defendant, who came to his house in February, about the negroes, that he had hired them by written contract, and did not want him to come there bothering about his hands; but that if he, defendant, would satisfy him, witness, that he had a contract with the negroes before his, witness', was made, he would discharge them. That he told Peterson Taylor, in February, 1871, before the indictment was found, that he had the negroes, and thinks he so testified on the trial upon the indictment.

G. Almond testified, that the defendant told him in July, 1871, that the prosecution against plaintiff grew out of bad feeling between his son P. Taylor and the plaintiff; that it ought not to be in Court; that P. Taylor, agent for the defendant, told him that he had made no contract with the negroes named in the indictment, and did not want any as he had them where he wanted them.

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James Brack testified, that he was present when the plaintiff was tried on the indictment; that on said trial Reuben Almond, since deceased, testified that P. Taylor told him that he did not have, and did not want any contract with the negroes named; that he had them where he wanted them.

Henderson Taylor, the defendant, testified that the negroes named in the indictment, had lived on his place in Morgan county, which his son Peterson Taylor managed as his agent, in 1870; that his son had informed him that he had contracted with said negroes to work on the same place for the year 1871; that some time in January, 1871, the negroes left his place and went to Mr. Poulaine's, on which the plaintiff lived as agent; that not long after they left, James Almond told defendant that the plaintiff had told him that he had hired said negroes when he knew they were under a verbal contract to work for the defendant for the year 1871, but not being in writing it was worthless; that said negroes had told him these things, and also, that they did not wish the defendant to know that they were about to leave, for if he did he would not settle with them; that he knew the negroes were working on Poulaine's place; that he never spoke to the plaintiff about hiring them; that he had never told plaintiff that he had hired no hands for the year 1871.

Peterson Taylor testified that as agent for his father, the defendant, he did make a verbal contract with the negroes named in the indictment, for the year 1871, and that he so told the defendant before said negroes left the place, and before the indictment was found; that he may have had a conversation with Mr. Poulaine as testified to by him, but is positive that he never reported that conversation to his father; that he did not say to George Almond, Reuben E. Almond, deceased, or to any one else, that he had not made a contract with the negroes mentioned, for the year 1871.

James Almond testified, that in the latter part of January or first of February, 1871, the plaintiff told him, at his house on Poulaine's plantation, that he hired the negroes named for Poulaine; that they told him before he hired them that they

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were under a verbal contract to live with the defendant for the year 1871, and that they did not want the defendant to know that they were going to leave, for if he did, he would not settle with them; that the plaintiff also said that the contract was of no account, as it was not in writing; that witness told the defendant of this conversation before the prosecution was commenced; that the conversation took place in the presence of the plaintiff's wife.

Louis Stepney, colored, testified, that he lived on Mr. Poulaine's land when the plaintiff was agent or overseer on the place; that some time in January, 1871, the plaintiff said to witness that he had some hands, naming those mentioned in the indictment, whom he wished to put in his (witness') squad; that he stated, at the same time, that the hands were under verbal contract for the year 1871, but as it was not in writing, it was no account; that he heard of the negroes coming to live with and work for Mr. Poulaine long before he ever saw the plaintiff.

The jury found \$100 00 for the plaintiff. The defendant moved for a new trial, upon the following grounds, to-wit:

1st. Because the verdict was contrary to law, equity and evidence.

2d. Because the Court erred in admitting, over the objection of defendant's counsel, evidence of a conversation between Peterson Taylor and Antoine Poulaine, both of them being witnesses, in the absence of the defendant.

The motion was overruled, and the defendant excepted.

BILLUPS & BROBSTON, by W. A. LOFTON, for plaintiff in error.

McHENRY & McHENRY, by brief, for defendant.

TRIPPE, Judge.

This was a case which, under the evidence, was one exclusively for the jury. No exception was taken to the action of the Judge, the one alleged in the bill of exceptions being

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withdrawn. Whether the statement of the witness, Poulaine, that "he told Peterson Taylor, in February, 1871, before the indictment, that he (witness) hired the negroes," was or was not admissible, its admission could not have damaged the defendant below. The witness had already testified that he told the same thing to the defendant in the same month. Whatever force was in the fact that Mr. Poulaine had hired the negroes, and that defendant was informed of it in February, it was distinctly stated by him, as a fact, that he had hired them, and had so notified the defendant. That he also so told the son of defendant, was an immaterial question as to the issue upon trial.

The Court did not abuse its discretion in refusing to grant the new trial.

Judgment affirmed.

ELIZABETH HATCHER, executrix, plaintiff in error, vs. A.
GAMMELL & COMPANY, defendants in error.

An entry by a sheriff on an execution as follows: "Received this *fi. fa.* of L. T. Downing for collection, August 15, 1869," signed by the sheriff, is a sufficient "entry" by an officer authorized to execute and return the *fi. fa.* to prevent the dormancy of the judgment.

Dormant judgment. Execution. Entry. Before Judge JAMES JOHNSON. Muscogee Superior Court. May Term, 1873.

Judgment was rendered in favor of plaintiff against defendants in the Inferior Court of Muscogee county, at the September term thereof, 1862, to-wit: on the 3d day of September, 1862, for \$350 00, principal, besides interest and cost. Execution was issued thereon on the 16th day of the same month, which went into the hands of James G. Cook, sheriff of said county, who, on the 20th day of November, 1862, entered on said *fi. fa.* his receipt to the defendant, A.

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Gammell, for \$14 25, the cost thereof. On the 28th day of said November, an entry was made on said *fi. fa.* by the clerk, A. P. Jones, acknowledging the receipt, from sheriff Cook, of \$7 45, his cost in said case. Afterwards, L. T. Downing, attorney for plaintiff, delivered said *fi. fa.* to J. J. Bradford, the deputy of John R. Ivey, who was then the sheriff of said county; and, thereupon, said Bradford made the following entry on the same:

“Received this *fi. fa.* of L. T. Downing for collection.

“JOHN R. IVEY, sheriff.

“Per J. J. BRADFORD, deputy sheriff.

“August 16, 1869.”

On November 4th, 1872, said Bradford, who had then become sheriff of said county, entered on said *fi. fa.* sundry levies on the property of the defendants therein, and, thereupon, said Gammell interposed his affidavit, alleging, amongst other things, that said *fi. fa.* was proceeding illegally in this, because the execution was issued from Muscogee Inferior Court on the 16th day of September, 1862, the levy dated the 4th of November, 1872, and no return was made on the execution for seven years prior to the levy. The execution and affidavit were returned by the sheriff to the Superior Court of said county. Upon the hearing of the illegality, the execution and the entries thereon were submitted in evidence, and the Court held the judgment on which said execution issued, dormant.

To this ruling of the Court, exception was taken, and error assigned thereon.

L. T. DOWNING, for plaintiff in error.

PEABODY & BRANNON, for defendants.

McCAY, Judge.

The Code, (Irwin's) section 2863, makes a judgment dormant if no “entry” be made upon it by an officer authorized to execute and return it for seven years. There is an entry

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here by the sheriff, who is such an officer. Is it such an entry as is contemplated by the statute? We think it is. What is it? A statement, signed by the sheriff and dated, that the execution is placed in his hands with orders to make the money. Section 397 of the Code makes it the duty of the sheriff to keep a docket of executions placed in his hands, the *date of their delivery*, and his actings and doings thereon, and have the same ready for use in any Court of the county. An entry of the date of the receipt of a *fi. fa.* is, therefore, proper matter for a return. It charges the sheriff; it is an official act. If transferred upon his book, it is notice to all that the plaintiff claims his execution to be a subsisting one: See *Battle vs. Shivers*, 39 Georgia, 415. It is not necessary that the entry shall be of some action on the *fi. fa.* It may be of some new action—anything that is properly a part of a return—everything that may charge or discharge him. Anything that, transferred upon the docket, will show the execution to be a living, acting thing.

Judgment reversed.

JACOB L. COBB, plaintiff in error, vs. A. J. PITMAN, defendant in error.

An affidavit of illegality to an execution from Whitfield Superior Court, in which the defendant alleged that he was never served with any process and copy of the declaration in the suit upon which said judgment was rendered; that he was, at the time said action was commenced and up to the date of the judgment, a resident of the county of Randolph and not of the county of Whitfield, was properly dismissed on demurrer, as it failed to disclose that he had not acknowledged service of the declaration and process, and that he had not appeared and pleaded to the merits.

Illegality. Service. Judgment. Before Judge McCUTCHEN.
Whitfield Superior Court. April Term, 1873.

For the facts of this case, see the decision.

D. A. WALKER, by brief, for plaintiff in error.

J. A. R. HANKS, for defendant.

WARNER, Chief Justice.

This was an affidavit of illegality to an execution, the defendant alleging therein that he was never served with any process and copy of the declaration in said case, that he was at the time said suit was brought and up to the time the judgment is claimed to have been rendered, a citizen of Georgia, residing in the county of Randolph, in said State, and not in the county of Whitfield, and the Superior Court of the county of Whitfield had no authority to render such a judgment against him. The plaintiff demurred to the affidavit, which demurrer was sustained by the Court, and the defendant excepted. The 3621st section of the Code declares that, if the defendant has not been served and does not appear, he may take advantage of the defect by affidavit of illegality, but if he has had his day in Court, he cannot go behind the judgment by an affidavit of illegality. To enable the defendant, by an affidavit of illegality, to go behind the judgment under this provision of the Code, he should not only swear that he was not served with a copy of the declaration and process in the case, but should also swear that he did not appear in the case and have his day in Court before the rendition of the judgment against him. Although he may not have been *served* with a copy of the declaration and process, still, he may have waived the same by an acknowledgment of service, or he may have *appeared* and pleaded to the merits of the case, as provided by the 3409th section of the Code, and thus have had his day in Court. Besides, the defendant might have been sued in the county of Whitfield, notwithstanding he resided in the county of Randolph, if he was a co-partner, or joint obligor, or joint promisor, with one who did reside in the former county, or if he was an indorser of a promissory note, the maker of which resided in Whitfield county, and if so sued

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in Whitfield county, and pending the suit the other party had died, the plaintiff suggesting his death on the record, might have obtained the judgment against the defendant as provided by the 3396th section of the Code.

The allegation that the Superior Court of the county of Whitfield had no authority to render a judgment against him, was a conclusion of law, which it was not competent for the defendant to decide for himself. When a judgment is rendered by a Court of competent jurisdiction, the presumption of the law is that it was rightfully rendered, unless the contrary appears on the face thereof. When a defendant seeks, by an affidavit of illegality, to go behind the judgment, and attack it on the ground that he has not had his day in Court, or that the Court in rendering the judgment had no jurisdiction of his person for that purpose, as prescribed by law, he should clearly and fully comply with the provisions of that section of the Code which authorizes him to do so. In our judgment, there was no error in sustaining the demurrer to the defendant's affidavit of illegality in this case.

Let the judgment of the Court below be affirmed.

THOMAS BARRON, plaintiff in error, vs. WILLIS COLLINS,
defendant in error.

When a declaration alleging that A. having, on the 1st of December, 1871, contracted with one Charles Barron, that he, the said Charles, should furnish himself and his two daughters and one George Barron to work as laborers on plaintiff's land, during the year 1872, the plaintiff to furnish the land and mules, and the said Charles to receive one-third and plaintiff two-thirds of the crop, and that the defendant, knowing the said contract had not been abandoned, but still existed, did, on the 25th of December, 1871, employ the said Charles, his two daughters, and the said George, to work for him for 1872, and that at the time of the bringing of the suit, to-wit: February, 1872, the said Charles *et al.*, were working for the defendant to plaintiff's damage, \$500 00:

Held, That no good cause of action is set forth in the plaintiff's writ.

Contracts. Master and servant. Before Judge JAMES JOHNSON. Talbot Superior Court. March Term, 1873.

This case is sufficiently reported in the head-note.

J. M. MATTHEWS, by brief, for plaintiff in error.

WILLIS & WILLIS, by HENRY L. BENNING, for defendant.

McCAY, Judge.

The demurrer to this declaration was properly sustained. The contract set out between the plaintiff and Charles Barron is not a contract of service. It does not appear that the labor of Charles Barron's two daughters, and of George Barron, belonged to Charles. As the contract stands, it is a contract of Charles Barron to furnish himself and three others, to crop with the plaintiff; he, Charles, not the laborers, to get one-third and plaintiff two-thirds of the crop. This did not make Charles and the hands he furnished, the servants of the plaintiff. As the contract is set forth, Charles is a cropper, the control of the labor is with him. It is the ordinary case of a man agreeing on his part to furnish the labor and another the land and stock. The laborers are the servants of Charles and not of the owner of the land. Charles is a contractor, not a servant. We think, too, the declaration is defective in not setting forth the nature of the damages. What was the damage? How did it accrue? Was the plaintiff at other expense in getting labor to work his land? Did his land go unworked? In what way did the interference of the defendant damage him? It does not follow that damage came simply because defendant hired the laborers which plaintiff supposed were to work his land.

We are not clear either that an action lies until the service has in fact commenced. The gist of the action is, enticing away the plaintiff's servants. Is one a servant of another for this purpose until he has actually entered into his service? Perhaps the contract was not binding; it does not

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appear to have been written, and it was not to be performed within a year. Nor does it appear that Charles was authorized to contract for the service of the others. We think, for these reasons, the Court was right in sustaining the demurrer.

Judgment affirmed.

ELLEN SINGLETON *et al.*, plaintiffs in error, *vs.* WILLIAM A. HUFF, defendant in error.

Where, in March, 1872, a homestead in the realty and personalty of the husband was set apart to the wife, and a levy of an execution immediately afterwards made on the balance of the land, and the husband died in April, 1872, pending the levy, the wife is not entitled to twelve months' support out of the proceeds of the sale of such balance. If there be special grounds set up by the wife, such as that the homestead exemption is not of the value of the twelve months' assignment, she should show that fact.

Homestead. Year's support. Administrators and executors. Before Judge ROBINSON. Jones Superior Court. October Adjourned Term, 1872.

This case arose upon a rule against R. P. Cook, sheriff of Jones county, issued at the instance of William A. Huff, requiring said officer to show cause why he should not pay over to said Huff the principal, interest and costs due upon an execution in favor of said movant against one Leroy Singleton. The answer of the sheriff set up substantially the following facts:

The execution was levied upon two hundred and fifty acres of land, and pending the advertisement, the defendant died. On the first Tuesday in May, 1872, said property was sold for the net amount of \$443 33, which he has retained in his hands under a notice from Ellen Singleton, the widow of the deceased, claiming the same as a year's support allowed her under the statute in such cases made and provided. The aforesaid land was all the property of which said defendant

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died seized and possessed. The appraisers appointed by the Court of Ordinary awarded to said Ellen Singleton the sum of \$500 00 as a year's support, to be paid out of the assets of said estate. The award has been excepted to by Huff, and the issue thus formed is still pending, undetermined, before the Court of Ordinary. Prays that the rule may be discharged.

The case was submitted to the Court upon the answer of the sheriff and the following additional facts: That previous to the death of Leroy Singleton, Ellen Singleton, his wife, applied for and had set apart to her a homestead of realty and personalty, according to the Constitution and Act of 1868; that this homestead was allowed her in March, 1872, and that the defendant, Leroy Singleton, her husband, died in April, 1872; that said Leroy Singleton died pending the advertisement, and before the sale of the land levied upon, but after the levy and seizure by the sheriff; that, at the time of the sale, there had been no administration upon his estate.

Pending the litigation, Ellen Singleton was made a party.

The Court ordered the rule made absolute against the sheriff. To this decision Ellen Singleton and the sheriff excepted.

LYON & IRVIN, by W. A. LOFTON, for plaintiffs in error.

BLOUNT & HARDEMAN, for defendant.

TRIPPE, Judge.

The wife of Leroy Singleton, in March, 1872, applied for and had set apart for her a homestead in the realty and the personal property of her husband. The sheriff then levied the execution of defendant in error upon the balance of the land of the husband. Before the sale, in May ensuing, the husband died, to-wit: in April, 1872. The land brought less than \$500 00, and the widow sets up her right to twelve months' support, etc., and that it should be paid out of the proceeds of the sale. Thus the wife had assigned to her of land of the value of \$2,000 00 in specie, a few weeks before

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her husband's death. For it is to be presumed that she got the full valuation allowed by law, as there was a portion of the land left unassigned. It may be assumed, also, that she has the \$1,000 00 in personalty, else the contrary should have been shown by her. She now, with that in possession, asks the balance of the estate as a twelve months' support.

In *Roff, Simms & Company vs. Johnson*, 40 *Georgia*, 555, it was held that, "the homestead is subject to the dower, and so, too, is the exemption of personalty subject to the year's support, whatever of the year's support has been received is to be deducted from the amount of the \$1,000 00." The converse of this proposition must be equally true, to-wit: whatever of the \$1,000 00 has been received, is to be deducted from the year's support, especially if it be in possession of the wife at the death of the husband. Here it was assigned only a very short time before she became a widow, and if she rested her claim on any special fact, such as the loss, destruction or consumption of it during the life of her husband, and that there was nothing for her support, she should have shown that fact.

It certainly would be going too far to construe these different provisions so that the wife could take the full homestead, should have and keep the same after her husband's death, and then claim the twelve months' support from the balance of his estate; and that, too, when the support is much less than either the homestead in the realty or the personalty.

In *Roff, Simms & Company vs. Johnson*, it was further said: "These several acts are to be taken together. Their common purpose is to provide for the family of a debtor, whose estate is about to be swept away for the payment of his debts, and we think it is doing no violence to the intention of the Legislature to hold that the family of a deceased debtor cannot take them all."

The Court did not err in adjudging the money arising from the balance of the land to the execution.

Judgment affirmed.

JOSHUA HARRIS *et al.*, plaintiffs in error, vs. JAMES M. GRAY, executor, defendant in error.

The Limitation Act of March 16, 1869, applies as well to debts, the consideration of which was slaves or the hire thereof, as to other debts. That part of the Constitution of 1868, denying jurisdiction to the Courts of suits on such debts having been declared void by the Supreme Court, there was in fact no prohibition of such suits.

Statute of limitations. Before Judge ROBINSON. Jones Superior Court. October Adjourned Term, 1872.

Gray, as executor of Nancy T. Parrish, deceased, brought complaint to the April term, 1872, of Jones Superior Court, against Joshua Harris and Arthur Harris, on a note made by said defendants on December 2d, 1862, whereby they promised to pay to the plaintiff, on December 1st, 1864, \$1,445 00, with interest from date.

The defendants moved to dismiss the suit on the following grounds: That an action upon said note was first brought to the April term, 1870, of said Court, and dismissed, as appears from the entry made by the presiding Judge upon his docket, "for want of jurisdiction." That a second suit was brought to the October term, 1871, which was again dismissed at the April term, 1872, by the following order:

"It appearing to the Court that the note sued upon in this action was given for the purchase of slaves; that it was given in 1862, and that this action has been brought since the adoption of the Constitution of 1868; it is, on motion of defendant's counsel, ordered, that said cause be dismissed upon the ground that this Court has no jurisdiction thereof."

It was admitted by plaintiff's counsel that these facts were true, and that no exceptions had ever been filed to the decisions of the presiding Judge in dismissing the two suits aforesaid.

Under this statement of facts the defendants contended that this suit was barred by the Act of March 16th, 1869.

The motion was overruled, and the defendants excepted.

Harris et al. vs. Gray.

LYONS & IRVIN; W. A. LOFTON, for plaintiffs in error.

BLOUNT & HARDEMAN, for defendant.

McCAY, Judge.

This was a motion to dismiss the plaintiff's suit, because, upon the face of his writ, it appeared that the debt was barred by the Limitation Act of March, 1869. The debt was due before the 1st of June, 1865, and this suit not brought until after January 1st, 1870. The reply to the motion was, first, that suit had been brought before the 1st of January, 1870; that at the October term, 1870, said suit was dismissed; that another suit had been brought within six months, which also was dismissed, and that the present suit was within six months of the dismissal of the second suit. It was stated, also, and does not seem to have been denied, that the note sued on was given for negroes. The present suit should have been brought by the 1st of January, 1870. Even if section 2972 of the Code should be held to be of force as to the Act of 1869, the present suit is not brought within six months from the dismissal of the first suit, and by the express terms of the Code, this privilege of suing again in six months can only be exercised *once*, if the debt be otherwise barred.

But it is said that as this was a negro debt, the plaintiff was prohibited from suing by the Constitution of 1868, and that the Act of 1869 cannot apply to his case. Assuming that the Act of 1869 does not apply to a case where plaintiff was prohibited by law from suing, the inquiry is, was he so prevented in this case? That part of the Constitution of 1868 which prevented him from suing, was void, as declared by the Supreme Court of the United States. He was not legally prohibited from suing. It is said, however, that practically he was prohibited; that the highest tribunal of the State so held. But a void law is no law; the plaintiff had a plain remedy. If the Judge of the Superior Court dismissed his suit he should have appealed to this Court, and if this Court refused him his rights, he had the right, and it was

his duty, to resort to the Supreme Court of the United States. On the question involved, an appeal would lie by writ of error. It is not true, therefore, that he was prohibited from suing. He ought not to have submitted to the dismissal of his suit in 1870. It is no reply to say that the Supreme Court of the State agreed with the Circuit Judge. In all cases where there is an appellate tribunal the legal question in dispute is not finally decided until the final tribunal has passed upon it. One might just as well say he acted on the opinion of a Justice of the Peace, or a Judge of a County Court, or the Judge of the Superior Court. From each of these there is an appeal finally to this Court, and on certain questions from this Court to the Supreme Court of the United States. We know of no justification for stopping at one point in the series rather than another. It will occur that Justices, Superior Court Judges, and Supreme Court Judges, will err. In such cases the only remedy is to appeal, and until the appellate tribunal has passed on the question no person has a right to consider it settled.

Every man must see to his own rights. If a Judge or a Court, even the highest Court of a State, decides one man's case, and he submit to the decision, and another man, whose case is decided on the the same principle, appeals and has the decision reversed, the party who failed to appeal gets nothing by the superior pluck or perseverance of the appellant. Nor can he complain. He could have got the same result by the same process.

We conclude, therefore, that the plaintiff was not prevented. True, the Judge so held, but the Judge was wrong; there was no valid law prohibiting suit. That part of the Constitution of the State is either good or bad. If it is good, the plaintiff's suit falls by it. If it is bad and allows him to sue now, it was always bad, and he could always have sued.

Judgment reversed.

Sams & McArthur vs. Tracey, Irwin & Company.

SAMS & ARTHUR, plaintiffs in error, vs. TRACEY, IRWIN & COMPANY, defendants in error.

The verdict in this case being strongly and decidedly against the weight of the evidence, the discretion of the Court below in granting a new trial will not be controlled.

New trial. Before Judge HARVEY. Gordon Superior Court. February Adjourned Term, 1873.

To give a detailed report of this case would illustrate no principle of law. The facts are sufficiently set forth in the decision. The evidence strongly preponderated against the defense sought to be sustained.

W. H. DABNEY, for plaintiffs in error.

ALEXANDER & WRIGHT, for defendants.

WARNER, Chief Justice.

The plaintiffs brought an action against the defendants on a promissory note for \$314 97, and on an account for goods sold, for the sum of \$161 70. The defense set up was that the defendants directed the goods mentioned in the account, and the goods for which the note was given, to be sent by the plaintiffs to them from New York by the inland express route, whereas, the plaintiffs sent the goods by the ocean express route, and were lost. On the trial of the case, the jury found a verdict for the defendants. The plaintiffs made a motion for a new trial, on the ground that the verdict was contrary to the charge of the Court, contrary to law, contrary to the evidence, and without evidence to support it. The Court sustained the motion and granted a new trial, whereupon the defendants excepted.

In considering the evidence contained in the record, and the law applicable thereto, we find no error in the judgment of the Court granting the new trial, which will authorize this Court to interfere and control it.

Let the judgment of the Court below be affirmed.

ANDREW J. SHAFFER, plaintiff in error, vs. JOHN A. HUFF, defendant in error.

1. Where H. is indebted to S., and to secure him for the debt due, and for a further advance of money made by him to H., H. and his wife, with the approval of the Ordinary, convey the homestead which had been set apart for the benefit of the family of H. to the creditor, and he, at the same time, takes the notes of the husband for the debt, and executes a bond to make titles to him for the same land, upon the payment of the notes :

Held, That the whole transaction constitutes nothing more than a mortgage, and the rights of the beneficiaries of the homestead arising out of these facts can be set up by the husband in an action against him by the creditor to recover the land.

2. The fact that the creditor and the husband, on the maturity of the notes, agree between themselves, without the consent or approval of the wife or the Ordinary, to cancel the bond and the notes, does not deprive the wife and children of their rights under the agreement.

Equitable mortgage. Ejectment. Husband and wife. Homestead. Before Judge RICE. Gwinnett Superior Court. March Term, 1873.

Shaffer brought complaint against Huff for two hundred and sixty acres of land, lying in the seventh district of the county of Gwinnett. The defendant pleaded as follows :

1st. The general issue. 2d. That he holds plaintiff's bond, conditioned to make titles to the land upon the payment of two promissory notes; that said notes have been discharged and taken up. 3d. That the deed under which the plaintiff claims was made and intended to be used simply as a security for the loan of money made by plaintiff to defendant, the amount not being more than one-third the value of the land. 4th. That the land in controversy was set apart, under the homestead laws, to the defendant as head of a family, and thereby vested in his wife and children, and as no part of the consideration of the deed was the debt of the wife, the deed is void.

The evidence made the following case : On December 3d, 1868, the land in controversy was set apart to defendant as a

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homestead for himself and family. On February 16th, 1870, the defendant and his wife, with the consent and approval of the Ordinary, for the alleged consideration of \$415 22, conveyed said property to the plaintiff. On the same day the plaintiff executed a bond conditioned to reconvey said land to defendant upon the payment of two promissory notes, one for \$212 92, and the other for \$202 30, both to become due on December 1st, 1870. At the date of the deed the defendant was indebted to the plaintiff the amount of the consideration, less \$100 00, according to defendant's evidence, and less \$200 00, according to plaintiff's statement. This additional advance was made in consideration of the deed. The plaintiff swears that the conveyance was absolute, the defendant asserts to the contrary, and alleges that the deed and bond for titles together constitute an equitable mortgage. On February 17th, 1871, the defendant executed an instrument releasing the plaintiff from any obligation on said bond, canceling the same, and agreeing to deliver it up on demand. The alleged consideration of this document is the failure to meet the notes at maturity, and their delivery to the defendant. The defendant testifies that he signed this relinquishment under an agreement that one Vaughan was to pay to the plaintiff the amount of his indebtedness, and the latter was to convey the title to the former, that Vaughan was then to give to the defendant his bond for titles, conditioned upon the repayment of the money paid to the plaintiff; that at the time of signing said instrument and of receiving said notes, he supposed this arrangement had been perfected, and that nothing remained to be done but the execution by Vaughan of said bond; that he refused to part with plaintiff's bond until that of Vaughan was substituted, and consequently yet has it.

Joseph P. Brandon testified, that in January, 1870, plaintiff and defendant called on him for the purpose of borrowing money, and proposed to give a lien on the land in dispute to secure the repayment of the same; that he did not recollect who the money was to be borrowed for; that not having the

funds to lend no contract was entered into; that plaintiff proposed to give the lien, as he claimed to hold the title.

Much conflicting evidence was introduced upon the above points unnecessary here to be set forth.

Under the charge of the Court, the jury returned a verdict for the defendant. The plaintiff moved for a new trial upon the following grounds, to-wit:

1st. Because the Court erred in charging the jury as follows: "A sale of property by one person to another, and an obligation by the latter to reconvey the same on certain conditions, when the transaction creates or recognizes as existing the relation of debtor and creditor between the parties is a mortgage. A mortgage is only a security for debt and passes no title."

2d. Because the Court erred in charging the jury as follows: "If the relation of debtor and creditor existed between the parties at the time of the transaction in which the deed and bond for titles were executed, and the object of the transaction was to secure the payment of the debt, then the deed and bond for titles created only a mortgage and passed no title. In such case the deed and bond for titles constitute but one instrument, and must be construed together, and the defendant and his wife, both being parties to the transaction, the delivering up and cancellation of the bond for titles by the husband, did not change or destroy the character of the transaction, 'once a mortgage always a mortgage.'"

3d. Because the Court erred in charging the jury as follows: "If the deed of the husband and wife, though made under the approval of the Ordinary, and the bond for titles to the husband created a mortgage, then the cancellation or relinquishment by the husband, of the bond, did not change the character of the transaction; and the instrument being only a mortgage, the homestead vesting the title, or rather the beneficial use of the property in the wife for her use and that of her children, prevails over the mortgage, and the plaintiff has 'no title in himself on which he can recover as against the homestead set apart for the use of the defendant

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and his family.' The defendant can set up the homestead set apart for his family as a defense to plaintiff's action ; and if the deed on which plaintiff relies, taken in connection with the bond, was only a mortgage, plaintiff cannot recover."

4th. Because the Court refused to charge the jury as requested by plaintiff's counsel, in writing, "That the rights of the wife under the homestead, or under section 1773 of the Code, are not in controversy in this case. This is an action of ejectment when the legal title to the land in dispute is the only question, and must prevail ; and if the legal title was in the plaintiff at the time the suit was instituted, he is entitled to recover."

5th. Because the verdict is contrary to the law and to the evidence.

A new trial was refused, and the plaintiff excepted.

N. L. HUTCHINS ; J. N. GLENN, for plaintiff in error.

F. F. JUHAN ; CLARK & PACE, for defendant.

MCCAY, Judge.

1. There can be no question that the first transaction (the advancement of the money, the taking of the deed, and the giving of the bond,) was, whatever may have been the words used by the parties, only intended to be the securing of Mr. Shaffer for the money he had due him from Mr. Huff, and the additional advance made by him at the time. It is true that the plaintiff says it was intended to be an absolute deed, but the defendant says just the contrary, and the transaction has all the marks by which Courts usually determine such instruments to be not deeds, but mortgages. The land is worth more than the amount ; the notes given for the repurchase are the same as the amount due, and the grantor remained in possession. The testimony of Mr. Brandon is also in favor of this view. At any rate, the evidence is sufficient, abundantly, to justify the verdict of the jury on this point. Nor does the fact that the bond for titles was to the husband, and not

to the husband and wife, in terms, alter the matter. The husband, is the trustee of the wife for any separate estate she may have, which he gets into possession if she have no trustee, and when he took the bond he was only a trustee for her. Had he paid the notes, it will hardly be contended he would not have taken the land for the use of his wife and children just as it was before it was *deeded* to the plaintiff. If the transaction was, as seems pretty clear from the evidence, a mere arrangement to secure the plaintiff in the money the husband owed him, and which he advanced, *then*, whatever the terms of the bond, on the payment of the money, the title would, by operation of law, be again what it was before, to-wit: a homestead for the wife and children.

2. Nor could the plaintiff and the husband, by any arrangements between themselves for the cancellation of the bond, affect the wife's rights. The plaintiff had full notice of her rights, and when he took up his bond he well knew that she was the true beneficiary of the land. If the homestead provision of the law is to have any sacredness at all, such a transaction as this record discloses should be looked at with great suspicion, and we are not disposed to be astute in finding objections to a verdict of this kind. The most that can be said for the plaintiff, under the facts, is that he has a lien on the land for his money. If the land were not a homestead, this would be clearly so. But we see serious difficulties in the way of making the transaction good, even as a mortgage, on the homestead. The Ordinary has not approved the deed as a mortgage. Perhaps he would not have approved it had he known the facts, to-wit: that the object was not in fact to sell and buy another homestead, but to pledge the homestead for money borrowed, and already due by the husband. The law only authorizes an alienation with the approval of the Ordinary. For myself, I am of opinion that the Ordinary ought in no case to consent, until he is perfectly satisfied that the funds produced by the sale will be promptly reinvested in another homestead. The object of the law is to provide a home for the family against the improvidence of the husband.

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This object is but poorly attained, if the parties may sell and waste the proceeds. It is the duty of the Ordinary to see to the object of the parties and not to approve unless he is satisfied the true objects of the statute will be carried out.

Judgment affirmed.

JOEL J. MORING, plaintiff in error, vs. A. C. FLANDERS, administrator, defendant in error.

A factor or merchant holding a lien under section 1977, Irwin's Revised Code, when the maker thereof is dead, may, in order to preserve his lien and such priority as he may be entitled to, if any, in the distribution of his debtor's estate, make the affidavit required by law for its enforcement within twelve months after the qualification of the representative of the estate, but there can be no levy of the execution issued thereon until after the expiration of the period of exemption from suit, allowed executors and administrators.

Administrators. Factor's lien. Illegality. Before Judge HERSCHEL V. JOHNSON. Emanuel Superior Court. April Term, 1873.

Moring foreclosed a factor's lien, existing only in parol, against Flanders, as the administrator of John R. Prescott, deceased, for \$288 00. The defendant filed an affidavit of illegality thereto. The issue thus formed was submitted to the Court upon the following agreed statement of facts:

"Plaintiff filed his affidavit before John C. Coleman, Ordinary of said county of Emanuel, on January 6th, 1872, setting forth facts sufficient to create a lien, under section 1977 of Irwin's Revised Code. Said Ordinary issued an order directed to the clerk of the Superior Court of said county, ordering him to issue a *fi. fa.* for the amount of the plaintiff's debt. On the same day, the clerk issued an execution which was levied by the sheriff of said county on certain property belonging to the defendant's intestate. Letters of administration were issued to the defendant on January 1st, 1872."

Defendant moved, under the above statement of facts, that the affidavit and levy be dismissed, upon the following ground : Because the proceeding was a suit for the recovery of a debt due by the decedent anterior to his decease, and was commenced against the administrator before the expiration of twelve months from the date of his letters of administration.

The motion was sustained, and the plaintiff excepted.

JOSEPHUS CAMP; JOHN M. STUBBS, by PEEPLES & HOWELL, for plaintiff in error.

WARD & CAIN, by Z. D. HARRISON, for defendant.

TRIPPE, Judge.

The lien claimed by the plaintiff existed in parol. We cannot see that any damage could result in permitting him to make the affidavit, and thus have the claim put that far in such a form as would enable him to assert whatever priority he might have, if any, in the distribution of the assets of his deceased debtor. If he has none, no hurt is done, and he has his cost to pay. If the claim is paid by the administrator, he can have a voucher in a more satisfactory form—the very form, probably, that he should require in just such a case as this, where it was a verbal contract. The administrator thus paying it, if he did so in proper time, should not be taxed with any cost.

We think to allow this is not in violation of the law exempting administrators from suit for twelve months. The affidavit, without process to enforce it, is not a suit. But no levy could be made by virtue of any execution issued on such affidavit within the period of the twelve months exemption. That would be a clear violation of the rights of the administrator. He has the right to contest the claim, and should have due time therefor. No judgment has been obtained against the intestate in his lifetime, and no opportunity for any one to be heard. The representative of the estate can-

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not at once be thus forced into litigation. Besides, he has the time allowed him, so that he may inquire into the condition of the estate, the amount of assets and the liabilities. Many of the debts or liabilities may have preference over this. Expenses of administration, funeral expenses, etc., stand on a footing that entitle the administrator to time for investigation into the condition of the estate, so as to ascertain what the priorities may be as between creditors, including the widow and the minor children.

The Court was not in error in dismissing the levy. The affidavit should have been permitted to stand. There was no necessity to vacate it.

Judgment reversed, in so far as the affidavit was dismissed.

HARDEMAN & SPARKS, plaintiffs in error, vs. J. E. DE-
VAUGHN, defendant in error.

1. When a commission merchant and factor advanced money to a planter to purchase supplies, the planter agreeing, in writing, to deliver to the factor, at his own house, in Macon, enough of the crop upon which the money was thus advanced to pay for the said advance, and the planter accordingly did deliver at the depot of the Southwestern Railroad at Montezuma, such cotton, consigned to the factor, at Macon, and after such delivery the cotton was seized to satisfy a lien under the Act of 1866, given to a third person and prior to the factor's advance, but not foreclosed until after the delivery of the cotton at the depot, so consigned to the factor:

Held, That the delivery at the depot of the cotton consigned to the factor, was, for the purpose of the lien, a delivery to the factor, and his special property thereupon attached, even against other liens under the Act of 1866, given prior to the factor's advance, if the factor had no notice of said liens prior to his advance, and there was no foreclosure of the prior lien before the delivery at the depot, as described.

2. If an issue be made upon a lien foreclosed under the steamboat lien law by affidavit, or if there be a claim to the property, the papers are to be returned and the issue tried in the county of the residence of the defendant.

Factor's lien. Delivery. Steamboat lien. Venue. Before Judge CLARK. Macon Superior Court. May Term, 1873.

J. E. DeVaughn levied an execution, based on a factor's lien for supplies furnished to R. D. Brown, with which to make a crop for 1872, dated on the 17th of February of that year, amounting to \$180 00, and \$20 00 for counsel fees, on three bales of cotton. The cotton was claimed by Hardeman & Sparks.

The plaintiff introduced in evidence the proceedings upon which his execution was based, the execution and the levy. He testified that the cotton when levied on, was on the platform of the depot of the Southwestern Railroad, at Montezuma; that Brown, the defendant in *fi. fa.*, then told him that the cotton belonged to him, was raised on his place, and was brought to the depot on his wagon.

Claimants introduced the deposition of Brown to the following effect:

Witness executed the following instrument:

"\$500 00.

March 5th, 1872.

"TO HARDEMAN & SPARKS:—Eight months after date, please pay to the order of myself \$500 00, for value received, as an advance on my growing crop of cotton for the year 1872, for provisons and commercial manures furnished to enable me to make said crop. In order to secure said advance I hereby give you a lien on my said growing crop of cotton as well as on my growing crop of corn, and I agree to deliver to you at your warehouse, enough of said cotton crop to pay this draft at maturity. In order further to secure said advance and the payment of all costs and counsel fees, of ten per cent. incurred in the premises, I hereby mortgage to you and your assigns my stock of all kinds on the plantation cultivated by me in Houston county, to-wit: four mules. And I hereby give you full and legal control of said crop and of said mortgaged stock, waiving all right of homestead exemption therein, with power to transfer this lien. And if not paid at maturity to

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bear interest at the rate of ten per cent. per annum from date hereof.

“Witness my hand and seal.

(Signed) R. D. BROWN. [L. S.]

“Executed in presence of

“(Signed) GEORGE W. KILLEN.

“Accepted. (Signed) HARDEMAN & SPARKS.

“Indorsed. (Signed) R. D. BROWN.”

The consideration of said instrument was advances in supplies made by claimants to enable witness to make a crop for the year 1872. The cotton, at the time of the levy, was in the possession of the Southwestern Railroad Company, to be delivered to claimants to satisfy their claim for supplies, etc. Claimants are factors and commission merchants. The cotton was not levied on before any shipping order was given by witness to the railroad company.

The claimants introduced the above instrument executed by Brown in their favor.

Thomas H. Marshall testified for the claimants substantially as follows: The cotton, at the time of the levy, was in the possession of the Southwestern Railroad Company, having been delivered to it to be shipped to claimants. At the time the cotton was delivered to the railroad company by Brown, he gave a shipping order for it to be shipped to claimants. The shipping order was delivered several hours before the levy. Witness was the cotton-shipping clerk of the railroad company. Does not remember whether he gave to Brown a planter's receipt or not. The original and duplicate receipts follow and control the cotton; the planter's receipt is a mere memorandum for the shipper, but exercises no control over the cotton. Witness shipped the cotton in obedience to the shipper's order. This was after the levy and claim.

The jury found the property subject.

The claimants moved for a new trial upon the following grounds, to-wit:

1st. Because the verdict was contrary to the law and the evidence.

2d. Because the Court erred in refusing to allow plaintiff to testify, that the defendant, Brown, at the time of taking out process, to enforce the lien upon which said execution issued, was a resident of the county of Houston and not of the county of Macon, and in rejecting the evidence of Brown to the same effect.

3d. Because the Court erred in refusing to charge as follows: "That the delivery of cotton by a debtor to a common carrier to be transported by such common carrier to a factor who has made advances to such debtor, is a delivery to the factor, and vests in him the title to the property, subject to an account between him and his debtor."

4th. Because the Court erred in refusing to charge as follows: "That the purchaser of property under one of these crop liens, who has no notice of such lien, takes the title discharged of the same, and this is true, whether he purchases an absolute or qualified title."

5th. Because the Court erred in charging the jury as follows: "This is a contest between parties holding crop liens under the Act of 1866, and the older lien would prevail over the younger, although the party holding the younger lien should obtain possession of the property, and although he had no notice of said prior lien at the time the property came into his possession."

A new trial was refused, and claimants excepted.

F. T. SNEAD; POE & HALL, by brief, for plaintiffs in error.

W. A. HAWKINS, for defendant.

MCCAY, Judge.

1. The claimants were proven to be factors and commission merchants. As such, they have a lien, wholly independent of the Act of 1866, on the property of a planter to whom they have made advances, as soon as, and as long as they have pos-



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session of the property. This is true, at least, as against all liens of which they have no notice, either actual or constructive. If, therefore, Hardeman & Sparks did advance to Brown, under a written agreement by Brown that he would deliver to them cotton sufficient to pay the advance, it would follow that, as soon as Hardeman & Sparks got possession, their rights attached. They had a special property in the cotton, against Brown or any purchaser from him, after their possession, or against any lien or judgment, the lien of which did not begin until after their possession. And this was wholly independent of the Act of 1866, and wholly independent of the nature of the advances—that is, whether they were for provisions or not. Was the delivery of the cotton at the depot of the Southwestern Railroad, consigned to Hardeman & Sparks, such a delivery to Hardeman & Sparks as brings the case within the rule we have stated? Did Hardeman & Sparks, by such delivery, get such a possession as made their lien good, as a factor's lien, so as to authorize them to put in this claim on their special property, and so as to prefer them to Vaughn? In the case of *Kollock et al. vs. Jackson*, 5 *Georgia*, 155, this Court held that the delivery to the factor might be *constructive*, and need not be actual. In *Wade & Company vs. Hamilton*, 30 *Georgia*, 450, the precise point here made was decided, to-wit: that a delivery to a carrier, in pursuance of an agreement to deliver to the factor, was, if the goods were consigned to the factor, such a constructive delivery to the factor as made his lien attach. And at the last term of this Court, in the case of *Elliott vs. Cox et al.*, we decided the same thing. We are of opinion, therefore, that the Court erred in refusing to charge, as requested by claimant's attorney, that if the cotton was delivered to the Southwestern Railroad, consigned to Hardeman & Sparks, before the plaintiffs' lien was foreclosed, Hardeman & Sparks should recover.

2. We think, too, after much deliberation, that the residence of the defendant is the proper county to try any issues that may be found on these liens. The Constitution provides that all suits shall be had in the county where the defendant

lives. The steamboat lien law under which all these liens are, under the Act of 1866, to be foreclosed, does not, in terms, say what county the issue should be tried in. It simply says they shall be returned to the Court and tried as in other cases. We have held that the proceedings under the steamboat law are [not] proceedings in *rem*, but personal proceedings against the owner, or agent, or lessee of the boat, carrying a lien on the boat with them. Any other construction of the Act would make it an infringement on the maritime jurisdiction of the Federal Courts. If this be so, we do not well see how it can be otherwise than necessary to return any issue that may arise to the Court having jurisdiction in the county of the defendant's residence. We are aware that this is a new view of this law, but the point is now distinctly made and we cannot but decide it as we think the Constitution requires. We see no objection to making the affidavit and getting an authority to sell, *ex parte*, in any county, but if the defendant makes an issue, then the proceedings are only a mode of bringing a suit against him personally, charging his property as the basis. Our laws have now become so general that unless the Constitution be adhered to, a very large number of the suits against persons will be triable in some other county than their residence. It may be that this view will require new legislation, as it may be difficult to give effect to this rule in some cases under the law as it stands. But we cannot help this. The law is an awkward one any how. The enforcement of a lien on a steamboat, a rambling, changing and peculiar thing, is a poor model at best for liens on other things, and we have always thought it unfortunate that the other liens created by statute have so uniformly been made enforceable by mere reference to this steamboat law.

Judgment reversed.

Smith *et al.* vs. Ardis.

JOHN A. SMITH, administrator, *et al.*, plaintiffs in error, vs.
JOHN ARDIS, trustee, defendant in error.

1. Where a bill was filed against a defendant as administrator, seeking a decree against him in such representative capacity, a demurrer to an amendment, charging him individually, should have been sustained.
2. As an additional reason why the amendment should not be allowed in this case, it is apparent that the implied trust for which it seeks to make the defendant liable, is barred by the statute of limitations.

Administrators and executors. Amendment. Statute of limitations. Trusts. Before Judge HARVEY. Gordon Superior Court. February Term, 1873.

This case has been before the Supreme Court at a previous term: See *Ardis, trustee, vs. Printup, administrator, et al.*, 39 *Georgia Reports*, 648. The bill is there fully reported. All the facts necessary to an understanding of the issues here presented, are incorporated in the decision.

A. W. HAMMOND & SON; J. J. FAIN, for plaintiffs in error.

WARREN AIKIN; W. H. DABNEY, for defendant.

WARNER, Chief Justice.

1. The only question made in this case is whether the Court below erred in overruling the demurrer to the amendment to the complainant's original bill, which seeks to make Smith liable individually for the wrongful conversion of the trust funds, when the original bill charges him with having received the trust money, as the administrator of Abbott's estate. The original bill was filed against the defendants on the 2d day of October, 1868, in which it is alleged that the defendant, Smith, as the administrator of Abbott, made a private contract with Skelly to sell him a settlement of land in Gordon county for the sum of \$12,000 00; that the land was sold by Smith, as administrator of Abbott, at public sale, to perfect the title, and was bid off by Skelly in the spring of the year 1860 for

\$8,000 00, Skelly giving his notes to Smith, as administrator of Abbott, payable at different times, for the sum of \$12,000, specifying therein that the same was in part payment of said Abbott's land. Smith, as administrator of Abbott, executed a bond to Skelly to make him a title to the land when the notes should be paid. The complainant alleges in his original bill, that Skelly paid \$7,100 00 on the notes, and that the money so paid by him was the money of his *cestui que trusts*, and that Smith knew it. The object of the original bill, manifestly, is to subject the land to the payment of the alleged trust debt, alleging that Skelly's estate is insolvent. In fact, the bill prays that said Smith, as administrator of Abbott, may be required, by a decree of the Court, to convey the land to the complainant, as trustee, for the use of his *cestui que trusts*, and that the bond and notes be canceled, or that the land be sold and the complainant's trust debt may have a priority of lien on the proceeds of such sale. There is nothing in the original bill, or in the special prayers thereof, or in the general prayer of the bill, consistent with the allegations contained in it, which seeks to make Smith liable for the trust funds in his individual capacity. Smith, as the administrator of Abbott, and Smith, in his individual capacity, are different persons, in the eye of the law, so far as *personal* liability is concerned. The amendment introduced a new cause of action against the defendant, charged him with an individual liability for which he was not charged in the original bill, and for which no decree could have been rendered against him, individually, according to the allegations contained therein, either under the special or general prayer thereof, and if liable, individually, for the conversion of the trust fund, that liability was barred by the statute of limitations applicable thereto at the time the amendment was made.

2. The original bill alleges that the money was paid to the defendant, Smith, in the years 1860, 1861 and 1863. The amendment charges that the defendant, Smith, received the money, as charged in the original bill, and by the means therein charged, and if the estate of Abbott is not liable to

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account for the same, then the complainant prays that Smith be held liable, in his individual capacity, to account therefor. The amendment was made on the 11th of February, 1873. The trust for which the amendment seeks to make the defendant individually liable is not a continuing, subsisting trust, but an implied trust, which the statute of limitations of four years bars the remedy. In our judgment, the Court below erred in overruling the defendant's demurrer to the amendment.

Let the judgment of the Court below be reversed.

JAMES M. RODGERS *et al.*, plaintiffs in error, vs. M. HAMILTON, survivor, defendant in error.

Where a planter contracted a debt with a factor for provisions to make his crop, and gave a lien on his crop for the payment thereof, and of any attorney's fees for the enforcement thereof, and no action was taken to enforce the lien, but only a suit for the debt, claiming such fees as due for such suit:

Held, That the lien for attorney's fees was not a good lien, under the Act of 1866, authorizing liens to secure the payment of money due for provisions, etc., and that such fees are not recoverable in a suit at law for the debt.

Factor's lien. Attorney's fees. Before Judge CLARK. Sumter Superior Court. October Adjourned Term, 1872.

J. F. & M. Hamilton brought complaint against James M. Rodgers as maker, and Adams, Washburn & Company as indorsers, for the sum of \$592 30, besides interest, and \$40 00 as counsel fees, on the following instrument:

"\$592 30. AMERICUS, GEORGIA, March 4th, 1870.

"On November 1st, next, I promise to pay to Adams, Washburn & Company, or bearer, \$592 30, for value received, as an advance on my crop of cotton of the present year, raised in the county of Sumter, State of Georgia, said advance being for the purpose of enabling me to make said

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crop, and I do hereby give them, or bearer, a lien on my said crop to secure said advance, and any other advance made me during the year; and I also agree to deliver to them, or bearer, at Savannah, enough of said cotton crop to pay this note at its maturity, binding, also, hereby my crop of corn and my stock of all kinds for the full and punctual performance of the above obligation, and for the payment of all costs and counsel fees, if any are incurred in the premises, and giving them hereby a full and legal control of the same, with power to transfer this lien by delivery.

(Signed)

“JAMES M. RODGERS.

“Indorsed: ADAMS, WASHBURN & COMPANY.

“Credit of \$244 80.”

The defendants pleaded the general issue, part payment and failure of consideration.

Pending the litigation, the death of J. F. Hamilton was suggested, and the suit was ordered to proceed in the name of M. Hamilton, as survivor.

The defendants moved to dismiss the plaintiff's declaration so far as it claimed attorney's fees. The motion was overruled, and defendants excepted.

The plaintiffs introduced in evidence the instrument sued on, and the admission of defendants that \$40 00 was a reasonable charge for counsel fees.

The Court charged the jury as follows: “Well, gentlemen, on the production of the note by the plaintiff, and in the absence of proof by the defendants, it is your duty to find for the plaintiffs.”

The jury returned a verdict for the plaintiffs for the principal, interest and counsel fees sued for, less the credit entered on the written obligation.

The defendants moved for a new trial upon the following grounds, to-wit:

1st. Because the Court erred in refusing to dismiss the plaintiff's declaration so far as the claim for counsel fees was concerned.

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2d. Because the Court erred in the aforesaid charge.

3d. Because the verdict was contrary to the law and the evidence.

The motion was overruled, and defendants excepted upon each of the aforesaid grounds.

HAWKINS & GUERRY, by PHIL. COOK, for plaintiffs in error.

B. P. HOLLIS ; ALLEN FORT, for defendant.

McCAY, Judge.

Upon a fair construction of the contract sued on, we are of opinion that the agreement to pay counsel fees was a part, not of the contract to pay the money, but of the contract that the plaintiffs should have a lien on the crop. *This* seems never to have been enforced, and so far as counsel fees are concerned, is not a good lien under the Act of 1866. That confines the lien to provisions and commercial manures. We think, therefore, the plaintiff had no right to recover the fees for the present suit. But though we reverse the judgment we shall direct the Court not to grant a new trial if the plaintiff will write off from the verdict the amount of said fees.

Judgment reversed.

THE ATLANTIC AND GULF RAILROAD COMPANY, plaintiff
in error, *vs.* CARRIE R. BURT, defendant in error.

The evidence in this cause as to the distance the horse ran on and by the track before he was killed, was not only conflicting, but was such, when connected with the other facts proven, as to make it a proper case for the jury to decide the question of negligence on the part of the railroad, and there being no misdirection by the Court to the jury, we cannot disturb the verdict.

Railroads. New trial. Before Judge SCHLEY. Bryan Superior Court. April Term, 1873.

The Atlantic and Gulf Railroad Company vs. Burt.

Carrie R. Burt brought case against the Atlantic and Gulf Railroad Company for \$200 00 damages, alleged to have been sustained on account of the killing of a horse belonging to her by said defendant, through the careless and negligent running of its engines and cars. The defendant pleaded the general issue. The following evidence was introduced :

FOR THE PLAINTIFF.

R. Burt testified as follows : He was at station number one and a half, on the Atlantic and Gulf Railroad, in Bryan county, on the night of the accident; saw passenger train approaching; train was behind time; when train came up to the station, he found that a horse belonging to plaintiff had been killed; accident happened about five hundred yards from the station; the night was a bright moonlight one, and the accident happened about nine o'clock; the horse was worth \$200 00.

Stephanus Ford testified as follows : Was at the station, intending to go to Savannah on cars; knew the horse of plaintiff; it was worth \$200 00; train was behind time; was running fast.

Thomas C. Arnold testified as follows : Was called on to value the horse, and valued it at \$200 00; the horse was worth that sum, at least.

Thomas W. Davis testified as follows : The morning after the accident, was at station number one and a half, Atlantic and Gulf Railroad, and went to the place where the accident occurred; saw tracks of a horse which had run along the side of the track for about one hundred yards; was called on to value the horse, and valued it at \$200 00; saw the horse of plaintiff lying dead by the roadside, evidently killed by the cars; the tracks showed that the horse was running very fast at the time he was struck by the cars.

FOR THE DEFENDANT.

Thomas Rahn testified as follows : Was engineer of the train on the night of the accident; was approaching station number one and a half, and when about a quarter of a mile off, blew brakes to stop at station; train was running on sched-

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ule time, fifteen miles an hour; immediately after whistle blew, the horse jumped upon the track, about thirty or forty yards ahead of the engine; made every effort to stop the train by reversing the engine and blowing off steam, at the same time blowing the whistle to scare the horse from the track; the horse was running when I first observed him.

William Boone testified as follows: Was fireman on the train on the night of the accident; when approaching the station, a horse jumped upon the track, about thirty yards in front; every effort was made to stop the train by reversing the engine and putting on brakes; the horse was killed.

The jury returned a verdict for the plaintiff for \$200 00 and costs of suit. The defendant moved for a new trial, because the verdict was contrary to the law and the evidence. The motion was overruled, and the defendant excepted.

LAW, LOVELL & FALLIGANT, for plaintiff in error.

RUFUS E. LESTER, for defendant.

TRIPPE, Judge.

We were urged in the argument of this case to decide whether it was negligence on the part of a railroad company not to have its road fenced so as to keep stock off the road, and from the dangers of the running of the train. We do not see that there is any necessity to consider that question under the facts of this case.

The evidence touching the question of negligence in this particular case was somewhat conflicting, and it was a proper matter to be left to the jury. The two railroad employees testified that the horse jumped on the track about forty yards ahead of the car, and that the train ran about eighty yards before the horse was struck, or, in other words, the horse was forty yards ahead when he got on the track, and ran another forty before he was killed. They state they did what they could to prevent the accident, such as shutting off steam, blowing on brakes, etc. It was proven by the plaintiff that the horse ran about one hundred yards on and by the side of

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the road, and that from his tracks he was running very fast. It also appeared that the train was a passenger train, was approaching a station, and had already shut off steam and signaled the brakes to be put on before the horse got on the road. This brief statement shows what the jury was to pass upon. And the point was by no means so weak as, when decided in favor of plaintiff, to call for the setting aside the verdict. That point was, that there must have been fault on the part of some of the agents of the road, from the fact that after steam had been shut off, and the brakes applied, a passenger train would still overtake a horse, which was forty yards ahead and running very fast. It did not appear to be down grade, and in such a case we do not feel compelled to say the Court and jury should be overruled on account of the verdict.

Judgment affirmed.

H. A. LEE, sheriff, plaintiff in error, vs. JAMES W. ARMSTRONG, defendant in error.

1. A rule *nisi* against a sheriff is not demurrable for uncertainty which sets forth at its head the name of the plaintiff and defendant of a *fi. fa.*, the amount of the principal and interest at the date of the judgment, the Court to which the *fi. fa.* is returnable, and which alleges that the sheriff has had the *fi. fa.* long enough to have made the money.
2. Two *fi. fas.* may be included in one rule *nisi* against the sheriff, and if one of them be not fully described, a general demurrer does not lie to the rule.
3. This Court cannot consider a question not made in the record before it, and the fact that the clerk of the Superior Court has sent up with the transcript a portion of the record of another case, does not make that case a part of the record of this case.

Rule against sheriff. Practice in the Supreme Court. Before Judge CLARK. Macon Superior Court. May Term, 1873.

Lee vs. Armstrong.

A rule *nisi* issued at the instance of James W. Armstrong, against H. A. Lee, sheriff of Macon county, as follows :

"JAMES W. ARMSTRONG vs. SHADRACH WARE, security.

"Fi. fa. in Macon Superior Court. Principal, \$569 43. Interest to May 9th, 1864, \$132 86. Costs, \$15 00.

"THE SAME vs. SAME.

"Principal, \$434 46. Interest to March 20th, 1866, \$120 03. Costs, \$14 60.

"It appearing to the Court that the sheriff of Macon county, H. A. Lee, has had the above two *fi. fas.* in his hands long enough to have made the money due thereon, and that he has not done so, and no sufficient reason appearing why he has not done so: Ordered, that said sheriff, H. A. Lee, show cause, instanter, why he should not pay over the amounts due on the above two *fi. fas.*, respectively, to plaintiff's attorneys, or in default thereof, be attached for contempt of this Court."

The sheriff demurred to said rule, upon the following grounds :

1st. Because said rule did not contain sufficient averments to charge the sheriff with liability.

2d. Because it embraced two different executions, issued from different terms of the Court.

3d. Because said rule did not show any amounts due on said executions, except as appear from the statement of the cases.

4th. Because it fails to show any property subject to said executions out of which he could have made the money.

The demurrer was overruled, and the defendant excepted.

Accompanying the transcript of the record appear the proceedings subsequently had against the sheriff on the rule absolute, for the purpose of attaching him for contempt. No allusion thereto is made in the bill of exceptions.

W. A. HAWKINS, for plaintiff in error.

N. A. SMITH; JOSEPH ARMSTRONG, for defendant.

McCAY, Judge.

As this case at present stands we see no error in the judgment.

1. We do not think the rule *nisi* was so defective as to be demurrable. The heading is fairly a part of it. Indeed, it has been the practice for many years in this State to describe the *fi. fa.* just as it is done here. The names of the parties are stated, the amount of the principal and interest mentioned on the back of the *fi. fa.*, and the Court out of which it issued. It is then assumed and stated that, it having been made to appear to the Court that the above stated *fi. fa.* has been placed in the hands of the sheriff, and that he has had the same long enough to have made the money, it is ordered, etc. We think this certain enough to notify the sheriff what *fi. fa.* he is to answer about. With this and his answer there is enough to enable the Court, on inspection of the *fi. fa.*, to give a judgment.

2. We think, too, that two *fi. fas.* may be introduced in one rule. This has always been the practice in this State. We see no evil in it; and we will not disturb a practice so long continued. One of the *fi. fas.* is not described as fully as it, perhaps, ought to be, as there is no statement of the Court from which it issued. But as there is one *fi. fa.* stated fully, a general demurrer to the whole was not good. A special demurrer for this defect would have been met by an amendment. It does not appear that the original rule *nisi* was not on the minutes of December term. If so, there was no need of any establishment of the lost original. That the minutes do not show the original was signed by the Judge, is no objection. The law does not require any evidence of the assent of a Judge to an order, except his signature to the minutes. What may be the practice of the Judge is immaterial. One ground of the demurrer is, that the rule *nisi* cannot go on in the name of Armstrong. Why, does not appear. It was said in the argument that the reason was that Armstrong was dead. This does not appear in the record,

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and we cannot know it. We are pretty clear that a rule against the sheriff cannot be brought in favor of a dead man. It is a personal proceeding, founded, it is true, on the sheriff's contempt of the process of the Court, but it is a matter of right if the contempt be shown: Code of 1873, 3949; and the judgment is a lien on the sheriff's property, and may be enforced by levy and sale like other judgments: Code 1873, section 2001. It is a form of suit, and cannot go on in the name of a dead man. But, as we have said, it does not appear in the record that Armstrong was dead. The suggestion of his death here would not meet the case if he were dead at the time of the judgment, though the judgment would be void. We have, however, no original jurisdiction and can only determine the question after a judgment on the point by the Court below.

3. The paper which happens to be in the record (part of the proceeding in the second rule) we can take no notice of. It does not belong to this record. *This* bill of exceptions is to the judgment of the Judge overruling the demurrer to the original rule *nisi*, upon which the rule absolute is founded. The papers connected with the second rule have nothing to do with this case.

Judgment affirmed.

C. M. COMPTON & SONS, plaintiffs in error, vs. SARAH G. PITMAN *et al.*, defendants in error.

1. Land was devised to the wife for life, and at her death to be equally divided between two daughters, L. and E. Judgments were obtained against the representative of the estate on debts due by the testator. After the rendition of the judgments and death of the tenant for life, the land was equally divided between the daughters, L. and E. Subsequent to this L. mortgaged the portion she received to C. Plaintiffs in the judgments caused their executions to be levied on the share received by E. The executions not being satisfied from the proceeds of this levy, they were levied on the land of L. C., the mortgagee, filed a bill to enjoin the sale under this levy, on the ground, amongst others,

that plaintiffs made an agreement with E. or those holding under her, whereby they remitted all claims on her land for \$1,000 00, when the same was worth nearly four times that sum, and that thereby the whole of the balance of the executions, amounting to about \$6,000 00, is sought to be enforced against the land of L., on which he holds the mortgage:

Held, That the right of contribution existed between L. and E. as to the payment of the executions, and if the creditors discharged all claims on the land of E. for less than the proportionate share of her liability to contribute to L.—C., as the creditor of L., by mortgage, which has been foreclosed, is entitled to assert her rights, as well as his own equities arising out of such facts, against such creditors.

If the facts recited are established on the final hearing, and a sufficient showing was made on the application for injunction, to entitle complainant to such hearing—only one-half of the amount of the executions—not deducting the credit of \$1,000 00 collected of E., should be enforced against the land mortgaged to C. The levy should proceed and the land be sold, and the amount it may bring, in excess of one-half of the executions, should be impounded by direction of the Chancellor to abide the final determination of the cause.

2. The evidence at the hearing for an injunction, shows no equity arising out of the question as to part of the land received by L. being turned over to her by the tenant for life (who was the executrix) before the judgments were obtained, nor do the facts shown in the matter of the release by the creditors to L. of certain lands of her deceased husband's estate, although he was a co-defendant in some of the judgments, authorize the injunction to be enlarged, as her claim for dower and twelve months' maintenance, both of which had been assigned and set apart, would exhaust the same.

Injunction. Levy. Judgment. Contribution. Before Judge BARTLETT. Baldwin County. At Chambers. September 18th, 1873.

P. M. Compton & Company filed their bill against Sarah G. Pitman, Henrietta Miller, administratrix of Joseph Miller, deceased, James H. Nichols, executor of Thomas B. Lamar, deceased, and James W. Moore, sheriff of Hancock county, containing substantially the following averments:

1st. Complainants have mortgages on the "Justice" and "Davis" places of Eliza A. Roberson, lying in Hancock county; first mortgage, dated April 4th, 1870, on which \$493 43 is due, besides interest and cost; second, dated No-

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vember 29th, 1870, on which \$1,862 75 is due, besides interest and costs, and both are foreclosed.

2d. The sheriff of Hancock county levied upon said "Justice" and "Davis" places in June, 1872; upon the first, with the execution of Joseph Miller *vs.* Araminta Speights, executrix of John Speights, issued from Baldwin Inferior Court at its May term, 1866; upon the second, with the execution of Sarah G. Pitman *vs.* said Araminta Speights, executrix as aforesaid, issued upon a judgment obtained at the same term of said Inferior Court. The *fi. fa.*, of James H. Nichols, executor of Thomas B. Lamar, *vs.* Araminta Speights, executrix as aforesaid, issued upon judgment of August term, 1867, of Baldwin Superior Court, was in the sheriff's hands to claim money on distribution.

3d. William A. Roberson was principal and John Speights was surety, on the notes on which said judgments were obtained; judgments were likewise obtained on said notes against Roberson's administrator.

4th. Eliza A. Roberson arrested the sale of said "Justice" and "Davis" places under said levy of June, 1872, by a claim returnable to October term, 1873, of Hancock Superior Court.

5th. John Speights devised his lands to his wife for life, remainder to his daughters, Louisa Ray and Eliza A. Roberson, and made his wife executrix of his will; as such she assented to the "Justice" place, as a legacy, in 1863; the same year she relinquished her life estate therein, and gave possession thereof to Eliza A. Roberson, as part of her legacy under her father's will.

6th. The judgments of Pitman, Nichols and Miller are no legal liens on said "Justice" place, because obtained three and four years after such assent and delivery. The way for these creditors to reach the "Justice" place is to sue Eliza A. Roberson for contribution.

7th. Eliza A. Roberson consented for Pitman, Nichols and Miller, plaintiffs in *fi. fa.*, to take a verdict in the claim pending in Hancock Superior Court, declaring the "Justice"

and "Davis" places subject to their executions—she receiving as a consideration therefor a written release from said plaintiffs in *fi. fa.* of eight hundred acres of land, less her dower in five hundred acres thereof—all that remains of her husband's, William A. Roberson, the principal debtor's lands, from the liens of their judgments and liability to their executions.

8th. This release of the property of the principal discharges the surety, and complainants as mortgage creditors of the surety's legatee can set up this discharge.

9th. The bill prays—

1st. That the "Justice" place may be decreed not subject to the liens of the judgments of Pitman, Nichols and Miller, because it was a legacy assented to, paid, and vested, before said judgments were obtained.

2d. That both the "Justice" and "Davis" places are discharged from liability to these executions, because Speights, the surety, and his property, are discharged by releasing the principal's lands.

3d. That the said executions be enjoined until the further order of the Court.

4th. General relief.

The amendment avers—

1st. Pitman, Nichols and Miller, plaintiffs in *fi. fa.*, well knew that Speights was only surety, and so did their attorneys, Crawford & Williamson.

2d. The lands of John Speights were equally divided between his daughters, in the year 1869, Eliza A. Roberson receiving the "Justice" and "Davis" places; Louisa Ray, the "Homestead," "Ennis" and "Babb" places—each share worth \$3,800 00.

3d. Pitman, Nichols and Miller had these executions levied upon the "Homestead," "Ennis" and "Babb" places, and they were advertised for May sale, 1872; pending said levy and advertisement, and a few days before May sale, plaintiffs in *fi. fa.* compounded with Sallie Roberson (the daughter of Louisa Ray) and Sallie's husband, J. A. P. Roberson, (who

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were in possession of said three places), for the sum of \$1,000 00—and loaned said Sallie and J. A. P. Roberson their executions to buy said three places for said sum—the sheriff stating publicly at the time of crying said property for sale, that the places were only sold to perfect titles.

4th. Said plaintiffs in *fi. fa.* admit that the three places were assets in the hands of the executrix, Araminta Speights, at the time their judgments were obtained against her and at the time of her death.

5th. The “Justice” place is discharged from the liens of the judgments of Pitman, Nichols and Miller, because said plaintiffs in *fi. fa.* have released the “Homestead,” “Ennis” and “Babb” places, worth \$3,800 00, for \$1,000 00, and they cannot proceed against the “Justice” place, which was a legacy assented to, vested and paid, and in the hands of the legatee, Eliza A. Roberson, before said judgments were obtained, until the assets in the hands of the executrix are exhausted.

6th. Both “Justice” and “Davis” places are discharged, or else said plaintiffs in *fi. fa.* are precluded from the right to claim more than \$1,000 00 from Eliza A. Roberson. The “Homestead,” “Ennis” and “Babb” places are worth \$3,800 00. Plaintiffs in *fi. fa.* released them for \$1,000 00, leaving their executions fraudulently open for \$5,000 00 to be levied of the “Justice” and “Davis” places. Plaintiffs in *fi. fa.* thus violate the rule of law that legacies must abate *pro rata* to pay the testator’s debts, and by compounding with Sallie Roberson, deprived Eliza A. Roberson of her right to compel contribution from her co-legatee, Louisa Ray.

7th. A prayer for a discharge of the “Justice” place, on the fifth ground taken in the amendment.

8th. A prayer for a discharge of both places, on the sixth ground, and for general relief.

Sarah G. Pitman and Henrietta Miller, administratrix, by their answers, admit the following allegations:

1st. As to the mortgages of Compton & Sons; as to the executions having been levied in June, 1872; the stay of sale by the claim of Eliza A. Roberson; say, moreover, that Pit-

man's execution is against John Speight's estate alone, and that \$7,000 00 were due on all the executions at the time of said levy.

2d. Deny that the "Justice" place was assented to as a legacy in 1863; say that the executrix had possession of it, as unadministered assets, in 1867, and that the records of the Court of Ordinary show no such assent.

3d. See exhibit A of answer, being the petition of Eliza A. Roberson, in 1869, to the Baldwin Court of Ordinary, asking an equal division of her father's lands between her and her sister, Louisa Ray; Ordinary's order appointing partitioners and their division of the land by lot; the affidavits of J. A. P. Roberson and Callaway, stating that Araminta Speights had possession of the "Justice" place till her death, and Eliza A. Roberson did not get possession till 1869, and John Ray swears that he had possession of said place till 1869.

4th. Deny the executrix's power to assent, under the provisions of Speight's will, and because assent was before probate.

5th. Therefore, the "Justice" place is subject to the liens of these executions.

6th. Admit the release of the eight hundred acres of land; deny the effect claimed for it, *i. e.*, a discharge of Speights, and deny the suretyship of Speights.

7th. The year's support execution of Eliza A. Roberson, for nearly \$2,000 00, against estate of William A. Roberson, is prior to their executions in law. The dower of said Eliza annulled their levy as to five hundred acres, and the three hundred acres left would not pay the execution for the year's support, for they are not worth more than \$900 00. Wherefore, the estate of the surety is not damaged by the written release by said plaintiffs in *fi. fa.* of the lands of William A. Roberson, principal.

8th. The word "surety" was not written after Speight's name in the notes, nor does the fact of suretyship appear in the judgment.

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9th. The homestead (eight hundred acres of land,) was included by Eliza A. Roberson in her mortgages to complainants. The homestead was taken after said mortgages were made, and the lands valued at \$2 50 per acre, in gold.

10th. Eliza A. Roberson is utterly insolvent.

11th. The answers further aver that defendant's *fi. fas.* were levied in 1868, but their enforcement restrained, by military orders, and the Constitution of 1868, forbidding the enforcement of executions founded on slave debts.

The Chancellor refused to enjoin the executions as prayed. Whereupon the complainants excepted.

BENJAMIN W. BARROW; WILLIAM MCKINLEY, for plaintiffs in error.

CRAWFORD & WILLIAMSON, for defendants.

TRIPPE, Judge.

1. When the legatees are in possession of their legacies by legal authority, and the assets of the estate are exhausted, a creditor may proceed against each legatee for his *pro rata* share: New Code, section 2467. The right exists between such legatees to call upon each other for contribution, where one has been compelled to advance more than his share of the liability: 8 *Georgia*, 43. This being so, a creditor cannot compound with one legatee, equally liable with another, for less than the *pro rata* share of that one, discharge his lien on the property received by such legatee, when it is worth the full proportion of the legatee's liability, and then proceed to enforce the whole balance of his claim on the legacy received by another legatee. It may here be stated that it does not sufficiently appear that there was, or that there could have been, under the provisions of the will of John Speights, an assent by the executrix and a legal delivery by her to Eliza Roberson, of the land claimed to have been so turned over to her before the judgments were obtained. The lands were given to the widow, who was the executrix, for life, and at

her death to his two daughters, Mrs. Robertson and Mrs. Ray. The executrix did not have the power to select this particular place and give it to either one of the daughters as part of her share. Both the remaindermen had a vested right in the whole land *per my et per tout*. Indeed, in 1869, the two legatees, after the death of the tenant for life, regularly and by legal proceedings partitioned the land. So the question does not arise as to what are the rights and powers of judgment creditors, whose judgments are obtained after the legacies have been assented to by the executor and possession delivered to the legatees. The case is simply this, a judgment creditor has a lien on the property of both legatees. A creditor of one of those legatees has a lien on the property of one only. The first creditor, knowing all the facts, for a sum of money less than the value of the property received by one legatee, and less than what is her proportionate liability, discharges his lien on the property received by that one, and proposes to appropriate the whole property received by the other to the payment of the balance of his debt. We do not pronounce that these are absolutely the facts, which a jury has found or is compelled to find on the hearing. But we speak of them as presented for the purpose of the injunction asked for.

If a creditor have a lien on two funds, and another creditor has a lien on but one of the two, the latter can compel the former to proceed against that fund on which he has no lien. If a plaintiff in execution, for a valuable consideration, release property which is subject thereto, it is a satisfaction of such execution to the extent of the value of the property so released, so far as creditors and purchasers are concerned: New Code, sec. 3658.

The equity of these principles covers this case, and if the facts recited are established at the hearing, only one-half of the amount of the executions, not deducting the \$1,000 00 paid by Mrs. Ray, should be enforced against the land mortgaged by Mrs. Roberson to complainants. The levy should proceed, and the amount the land may bring, in excess of one-

Sims & Company *vs.* Howell.

half of the executions, should be impounded, by direction of the Chancellor, to abide the final determination of the cause.

2. It has already been stated that there was no equity, under the facts in the record, arising out of the question as to part of the land being turned over to Mrs. Roberson by the executrix before the judgments of the defendants in error were obtained. Nor do the facts shown in the matter of the release by the creditors to Mrs. Roberson, of certain lands of her deceased husband, although he was a co-defendant in some of the judgments, authorize the injunction to be enlarged beyond what is above indicated. Mrs. Roberson's claims for dower and twelve months' support, both of which have been assigned, would exhaust what was so released. It was simply a release of what could not have been made liable to either complainants' or defendants' claims. Hence, no damage to anybody, and, consequently, no equity can spring out of it. Let the injunction be granted, as has been already suggested.

Judgment reversed.

F. W. SIMS & COMPANY, plaintiffs in error, *vs.* JOHN T. & JAMES HOWELL, defendants in error.

The vendor of a fertilizer is presumed to warrant that the article sold is reasonably fit for the purpose intended. Nor is such fitness conclusively established by proof that the manufacturers, whose brand is on the particular article sold, do make an article containing fertilizing ingredients. Whether the thing sold be reasonably fit for the purpose, is a question of fact, to be determined, as other facts, by competent evidence, the composition of the article being one fact bearing upon the question, but not the only one. If, when *properly used*, it ordinarily fails to produce a good effect, it cannot be considered as reasonably fit, even though it may be shown that fertilizing ingredients are used by the manufacturers.

Factors' lien. Sale. Warranty. Before Judge CLARK.
Sumter Superior Court. April Adjourned Term, 1873.

F. W. Sims & Company foreclosed a factor's lien against John T. & James Howell for \$120 00, given for guano furnished them with which to make a crop for the year 1871. The defendants filed an affidavit of illegality to the lien *fi. fa.*, setting up that the guano purchased was utterly worthless.

The plaintiffs showed the sale of the guano, and proved by W. T. Seward, a manufacturing chemist, and by A. Means, the State Inspector of Fertilizers, that the Eureka guano, bearing the same brand as that sold to the defendants, contained valuable fertilizing ingredients. Their evidence was very strong, giving analyses of the elements composing the Eureka guano. Nine other witnesses were introduced, who stated that they had purchased such guano and had used it to great advantage.

The defendant, John T. Howell, and ten witnesses testified as to the worthlessness of the fertilizer. Also, that they had been sued for the amounts purchased by them, and were defending; that the spring was very wet and the summer exceedingly dry.

The jury returned a verdict for the defendants. The plaintiffs moved for a new trial, because the verdict was contrary to the law and the evidence. The motion was overruled, and the plaintiffs excepted.

HAWKINS, GUERRY & HOLLIS, for plaintiffs in error.

W. A. HAWKINS, for defendants.

MCCAY, Judge.

The only question in this case is, whether the evidence of the chemist and of Dr. Means makes out such a case in favor of the fitness of this guano for the purposes intended, as to make the proof that it, in fact, did no good, immaterial. We may remark that the evidence of these two gentlemen does not make out with certainty that the precise article got by the defendant and his witnesses, is the very article they testify about. Sometimes, doubtless, a good article gets to be a bad

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one, by adulteration or exposure, before it comes into the hands of the consumer; but we do not agree that the evidence of a chemist, or of anybody else, that a certain article, from the nature of its composition, is a good fertilizer, is proof conclusive of the fact. Theories do not always accord with experience. If an article professing to be a manure ordinarily fails as such when properly used, it is not a good manure, although the man of science may be very sure it is. It may be improperly mixed, etc. We recognize as true that a manure is not a bad one because it fails in a particular case, though even that is suspicious—it may be adulterated, but if it fails in the hands of many, properly using it in good seasons, it is asking a great deal to defendant for the opinion of a chemist, conclusiveness against the result of experience. The science of agriculture, and the law of the growth of plants, that mysterious process by which nature turns dead matter into living matter, is not so well understood even by scientific men as to make their opinions conclusive on such subjects.

Judgment affirmed.

MARY J. KING *et al.*, plaintiffs in error, *vs.* JOSHUA KING *et al.*, defendants in error.

1. There being no error of law committed, the finding of the jury on the facts will not be interfered with.
2. The affidavits of jurors are not admissible to impeach their verdict.
3. The verdict being manifestly against the charge of the Court as to the liability of one of the defendants, a new trial was properly granted as to him.
4. As special verdicts may be found upon the trial of equity causes, there was no error in overruling the motion for a new trial as to some of the defendants, and granting it as to others.

Jurors. Verdict. New trial. Equity. Practice in the Superior Court. Before Judge McCUTCHEN. Floyd Superior Court. July Adjourned Term, 1872.

This is the third time this case has been before this Court. It will be found fully reported in 37 *Georgia Reports*, 205, and in 45 *Ibid.*, 644. The only facts necessary to an elucidation of the issues here presented, beyond those contained in the decision, are as follows:

The fourth ground of the motion for a new trial was because the verdict was not unanimous, three of the jurors never having assented to the same. In support thereof were attached the affidavits of two of the jurors to the effect that they never had agreed to the verdict; that they and another juror having had no supper, and having become exhausted, consented that the papers might be delivered to the sheriff with the verdict thereon, but expressly reserved to themselves the right, if called on by the Court, to dissent from said finding; that said papers were handed to the sheriff about the break of day on Sunday morning.

By consent of counsel, the jury were permitted to return their verdict to the sheriff.

E. N. BROYLES; A. R. WRIGHT, for plaintiffs in error.

PRINTUP & FOUCHE; UNDERWOOD & ROWELL, for defendants.

WARNER, Chief Justice.

This was a motion for a new trial in an equity cause, instituted by the complainants against three defendants to recover certain trust funds alleged to be due by the defendants, or some one of them, to the complainants. On the trial, the jury found a verdict in favor of all the defendants. A motion was made for a new trial, on the several grounds stated therein, which was overruled as to two of the defendants, King and Franklin, and a new trial granted as to the defendant, Hargroves, administrator of Gartrell, to which ruling of the Court the complainants excepted.

1. We find no error in the charge of the Court to the jury, in view of the evidence in the record, and as the jury found

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in favor of King and Franklin, on the facts submitted to them by the Court, we will not disturb the verdict as to them.

2. The affidavits of the jurors were not admissible to impeach their verdict.

3. There was no error in granting the new trial as to Hargroves, administrator of Gartrell, as the verdict was manifestly against the charge of the Court as to his liability for the trust funds in his hands.

4. As special verdicts may be found by the jury on the trial of equity causes, there was no error in overruling the motion for a new trial as to the defendants King and Franklin, and granting the same as to the other defendant, on the facts of this case as disclosed in the record.

Let the judgment of the Court below be affirmed.

ABSALOM PARKER, plaintiff in error, *vs.* OBEDIAH GREEN
et al., defendants in error.

This being a judgment refusing to grant an injunction on a bill, answer and affidavits, we are not satisfied that there was any abuse of the discretion of the Court, and, there being no error of law, the judgment is affirmed.

Injunction. Before Judge CLARK. Sumter Superior Court. April Term, 1873.

Absalom Parker filed his bill against Obediah Green, his wife, Mary Green, and his son, Robert Green, making substantially the following case:

In the year 1872, complainant purchased from one Henry J. Taylor, at and for the sum of \$400 00, lot of land two hundred and twenty, in the twenty-eighth district of Sumter county. Prior to the aforesaid purchase, said Taylor was in the exclusive and peaceable possession of said lot, and on the 26th of December, 1872, turned over to complainant said possession. Taylor, before said sale, and complainant since,

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claimed said lot as their own, and exercised acts of ownership over the same. The land is valuable for the timber as well as for cultivation. There were seven or eight acres of open land, a house, erected by Taylor and his hands, and a well, on said property. Taylor made to complainant a deed to said lot and turned over to him the muniments of title to the same, consisting of a plat and grant from the State of Georgia to Jeremiah Robinson, dated January, 1829, deed from said Robinson to John C. Pipkins, dated September 1st, 1839, and deed from said Pipkins to Henry J. Taylor, dated December 9th, 1872. The deed from Taylor to complainant was dated December 18th, 1872. After complainant took possession of said property, he removed the house thereon to another part of the lot, to suit his own convenience. On January 16th, 1873, the defendants entered upon said property and filled up the well, of the value of \$30 00, and tore down said house, of the value of \$30 00. They threaten to do other acts of violence to said property, and again to destroy said house should the complainant replace it on said lot. The defendants have no title or *bona fide* claims to said land. They are insolvent and unable to respond in damages for the aforesaid illegal acts, or for any that they may hereafter commit. Complainant waives discovery. Prays that the writ of injunction may issue enjoining the defendants from committing any acts of trespass upon said lot, and from taking or holding possession of the same, and from interfering with the use, occupation and enjoyment of said property by complainant. Also, that the writ of subpoena may issue.

The defendants, by their answer, denied all the material allegations of the bill as to the title and possession of complainant. They attacked complainant's title as fraudulent and forged, but admitted doing the acts charged in said bill as trespasses.

Voluminous affidavits were submitted in support of the bill and answer respectively. They were in every respect conflicting, except as to the acts of the trespass alleged to have

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been committed by the defendants. The Chancellor refused the injunction, and the complainants excepted.

HAWKINS & HAWKINS; A. R. BROWN, for plaintiff in error.

PHIL. COOK; J. A. ANSLEY, for defendants.

McCAY, Judge.

We do not feel authorized to interfere with the judgment refusing an injunction in this case, as we understand the record. There is no house on the land. The cleared land is but fifteen acres, and that is, and has been, in fact, in possession of the defendant. The Judge has no power to turn him out, the *mesne* profits is a small matter, and clearing more land will be an advantage to the place. We think the plaintiff can wait for a final judgment at law without any serious danger. At any rate, as this is the judgment of Judge Clark, we cannot say he has abused the discretion the law gives him, when called upon to exercise his prerogative in issuing so severe a writ as an injunction.

Judgment affirmed.

CORLEY & DASSETT, plaintiffs in error, vs. THE GEORGIA RAILROAD AND BANKING COMPANY, defendant in error.

In an action against a railroad company on a contract instituted in a county other than the one where its chief office of business is located, the pleadings should show that the contract was either made or was to be performed in the county where such suit was brought.

Railroads. Venue. Pleadings. Before Judge HALL. Newton Superior Court. March Term, 1873.

Corley & Dassetts brought complaint in Newton Superior Court against the Georgia Railroad and Banking Company on an account for freight overcharges, with interest thereon. The

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declaration was in the ordinary statutory form of complaint on an account, referring to a bill of particulars thereto attached. It contained no allegations as to where the freight contracts were made or to be performed.

On demurrer, the declaration was dismissed, as failing to show jurisdiction in the Court. To this ruling the plaintiffs excepted.

FLOYD & MIDDLEBROOKS, for plaintiffs in error.

CLARK & PACE; PEEPLES & HOWELL, for defendant.

TRIPPE, Judge.

Neither the declaration, nor the bill of particulars attached, shows *where* the contract relied on *was made*, or where it *was to be performed*. In the bill of particulars, the items are stated as freight shipped "from Atlanta" or "from Augusta," but it nowhere appears to what point it was to be shipped, so that even the place of performance could be implied. A plea to the jurisdiction was filed and a motion made to dismiss the case for want of jurisdiction. No amendment was made or offered to be made, and the Court sustained the motion to dismiss.

To sustain an action against a railroad company on a contract in a county other than the county where the company's chief office of business is, it should appear that the contract was made or was to be performed in the county where the suit is brought: New Code, sec. 3406.

Judgment affirmed.

THE SOUTHWESTERN RAILROAD COMPANY, plaintiff in error, vs. S. M. COHEN, defendant in error.

1. Section 1585 of Irwin's Revised Code, requiring persons who shall sell by weights and measures to have their weights and measures marked as correct by the clerk of the Inferior Court, (now the Ordinary,) and

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in default of such marking, providing that such persons shall not collect any account, note or other writing, the consideration of which is any commodity sold by their weights and measures, is an Act fixing a penalty, and is not to be extended beyond its terms.

2. Where a lot of paper and paper bags was shipped to the plaintiff by railroad, and upon its receipt, it was weighed upon scales not marked, but which were proven to be correct, and the paper was found deficient in quantity, as described in the railroad receipt, it was not error to admit the evidence of the weighing, notwithstanding the failure to procure the marking of the scales.
3. If illegal evidence be admitted by a Justice and no objection be made at the trial, both parties being represented by counsel, the admission of the evidence is not a good ground for a *certiorari*.
4. The evidence in this case was sufficient to justify the judgment of the Justice.

Certiorari. Weights and measures. Construction of statutes. Railroads. Evidence. New trial. Before Judge CLARK. Sumter county. At Chambers. May 1st, 1873.

Some paper and paper bags were shipped to Cohen at Americus *via* Southwestern Railroad. The quantity delivered to him by the agent of said road at the point of destination fell largely short of the quantity called for by the railroad receipt. Cohen brought suit against the railroad for this deficiency, amounting to \$24 81, in a Justice Court.

Upon the trial in that tribunal, it was understood that all exceptions to testimony should be taken upon the argument of the case.

Cohen testified, that the deficiency in weight claimed was correct, but that the scales upon which the test was made were not marked, as required by section 1585 of Irwin's Code; that before weighing the paper and the paper bags, he balanced the scales and found them correct.

Upon the argument of the case, counsel for the railroad insisted that all the evidence of the plaintiff as to the deficiency in weight should be excluded, because the weighing was done on unmarked scales. The Court overruled the motion and rendered a judgment for the plaintiff; whereupon, the defendant applied for the writ of *certiorari*, on the ground of error

in the aforesaid rulings. The writ was refused, and defendant excepted.

S. C. ELAM; R. F. LYON, for plaintiff in error.

HAWKINS, GUERRY & HOLLIS, for defendant.

McCAY, Judge.

1. Sections 1584, 1588, of the Revised Code, providing for testing the accuracy of the weights and measures used in selling commodities, are not, by their terms, universal. They do not apply to persons engaged in *buying* by weights and measures, nor does it cover any cases except where goods have been *sold* by unmarked scales and measures. We see no good reason for confining the operation of such an Act to such weights and measures as are used to *sell* by. But this is the language and plain meaning of the law. We have no authority to extend the law to cases not included in its terms. It is a penal law. It affixes penalties and forfeitures upon one who *sells* by unmarked weights. It provides that no account, note or writing, the consideration of which is goods *sold* by such weights and measures, shall be collected. It would be contrary to well settled rules to give this Act the construction contended for, or to apply it to cases outside of its plain terms.

2. The scales used to determine the weight of this paper were proved by the witness before using them. He balanced them and found them correct, and we think this furnishes *legal* evidence that the paper was short when weighed.

3. The most that can be made out of the agreement, as to objections to the evidence is, that each party was to make his objections to the legality of the evidence, that is, its competency, at the argument. It is only stated in the petition for *certiorari* that the counsel of the defendant objected to the competency of the evidence as to the weighing. No objection is stated to have been made to the letters of the agents or to the statement of Rodgers. As to Rodgers, we incline to think his statements competent. They relate to the condi-

Monroe vs. Castleberry.

tion of the paper (at the time of the statement) at the depot, of which he then had, at least, partly, the charge. If the depot agent says to a man "your goods are here, and are in good or in bad order," is not this competent? Does it not relate to the then business of the agent, to-wit: his charge of the goods? The letters, we incline to think, were incompetent, for, at most, they are but admissions of past transactions. But as we read the record, they were not objected to for incompetency or because they were inadmissible, but only that they did not prove the plaintiff's case.

4. The facts, as stated, show that three hundred and twenty pounds of paper were shipped at Atlanta in good order—that is proven by the Macon and Western freight list. The goods were through freight. They started from Atlanta, directed to the plaintiff at Americus. Mr. Powers' letter shows this paper was received in good order at Macon, and the receipt for the freight at Americus shows that it came over the Southwestern road to Americus, and Rodgers' statement shows that the packages had been broken. Add, now, the plaintiff's statement that he weighed the paper, and that it failed to be as much as was charged for and paid for, to-wit: the amount shipped, and it seems to us a case is made out to justify the judgment.

Judgment affirmed.

LORENZO D. MONROE, Jr., plaintiff in error, vs. E. A. CASTLEBERRY, defendant in error.

Where an affidavit of illegality was filed to a mortgage execution on the ground that it had been paid, it was error to allow, upon the trial of the issue thus formed, a motion to be made to dismiss the levy and the execution on the ground that the mortgage was upon a growing crop, and, therefore, void.

Illegality. Mortgage. Practice in the Superior Court. Before DAVID H. POPE, Esq., an attorney at law, and Judge *pro hac vice*. Dougherty Superior Court. April Term, 1873.

For the facts of this case, see the decision.

L. P. D. WARREN; G. J. WRIGHT, for plaintiff in error.

WILLIAM E. SMITH, for defendant.

WARNER, Chief Justice.

It appears from the bill of exceptions and record in this case, that an execution had issued in favor of the plaintiff, on the foreclosure of a mortgage of personal property which had been levied on six bales of cotton. The defendant filed an affidavit of illegality to the execution on the sole ground that the claim on which the judgment and execution was founded had been paid off, with the exception of \$75 00, which last named amount she tendered in satisfaction thereof. On the trial of the issue thus formed, the defendant made a motion to dismiss the levy and mortgage *fi. fa.*, on the ground that it was founded upon a mortgage given and made upon a growing crop, and that a mortgage could not be made and was not good upon a growing crop, the crop not being a thing *in esse*, which motion was sustained by the Court, and the plaintiff excepted. The defendant did not take this ground of illegality in her affidavit, even if it would have been a valid ground, but, on the contrary, impliedly admitted that the mortgage was a valid mortgage, and that the property levied on was covered by it when she stated as her only ground of illegality to the proceeding, that the claim on which the same was founded had been paid off, except \$75 00, which she then proposed to pay, and that was the only issue presented to the Court for its consideration and judgment by the defendant's affidavit of illegality, and it was error in dismissing the plaintiff's levy and *fi. fa.*, on the statement of facts contained in the record.

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Let the judgment of the Court below be reversed.

APPENDIX.

SUPREME COURT OF GEORGIA,

AUGUST 20th, 1873.

On motion of Amos T. Akerman, Esq., the Court appointed the following named gentlemen, members of the bar of this Court, as a committee to report a suitable memorial commemorative of the Honorable Garnett Andrews, deceased :

Amos T. Akerman, A. H. Stephens, William M. Reese; L. J. Gartrell, L. E. Bleckley.

On November 13th, 1873, the committee submitted the following report, which was ordered to be spread upon the minutes :

"Garnett Andrews was born in Wilkes county, Georgia, in October, 1798. In 1822, he was admitted to the bar by the Superior Court of that county, after examination by a committee composed of Sayre, Lumpkin and G. E. Thomas. The required certificate of character was given by Duncan G. Campbell.

"In 1834, he was appointed Judge of the Northern Circuit, to fill the vacancy made by the death of William H. Crawford, and continued in that office until 1846.

"In 1850, he was a member of the State Convention called to determine the action of Georgia on the grave sectional questions then disturbing the country.

"In 1853, he was elected by the people to the Judgeship of his circuit, and in 1855 resigned it on becoming a candidate for Governor.

"In 1860, he represented Wilkes county in the General Assembly.

"In 1868, he was again made Judge of the Northern Circuit. He retained the office until his death, on the 14th of August, 1873.

"From this record it appears that his principal public ser-

vice was in the capacity of Judge of the Superior Court in one of the most important of our judicial circuits. He held this office under eight different commissions, and was chosen to it by every mode that has been practiced in this State—by legislative election, by popular election, and by executive appointment. Placed in this responsible station at an early age, following a man who had won an illustrious name among American statesmen, acting in the view of an intelligent people, and under the scrutiny of a most able bar, he was subjected to severe tests, but bore them well, and the public judgment soon ranked him among the soundest jurists of the State. This rank he maintained through life.

“His mind was naturally strong and quick. He was well grounded in legal knowledge, of the sort which a Judge most needs—a knowledge of principles. He was industrious, patient and self-possessed. He was sagacious in discovering the essential matter of a case, able to hold himself open and unbiassed to the close of a discussion and then to come to a prompt decision, glad to be instructed by argument and authorities, ready to change his opinion when convinced that he had been wrong, but unbending to any pressure when his convictions were settled, thoroughly impartial, not only in purpose, but in fact, and profoundly anxious to do justice according to law.

“In the discharge of his duty, he sometimes encountered popular censure and popular menace; but these things neither deterred nor disturbed him. He never murmured at the Supreme Court, but cheerfully executed its judgments when they reversed his own. To the bar he was kind and respectful, and if he sometimes addressed them with bluntness, this was always in good temper, and from a desire to hold them to the point in issue.

“In the peculiar ‘society of the circuit’—in that company which gathered in the Judge’s room when the day’s labor in the Court-house was over—he was one of the most agreeable of men. Those who have been with him on such occasions will long remember his pleasant manner, his peculiar diction, often homely, but always apt and forcible, his shrewd obser-

vations, his delightful reminiscences of men who have long since passed away, and his uniform respect for the things that are true, honest, just, pure, lovely and of good report.

"He took a warm interest in public affairs. In the vicissitudes of politics, he was often in the minority, and submitted gracefully to the popular will, never believing that the country was ruined because his party was out of power. His fellow-citizens, of all parties, accorded to him a hearty patriotism, a firm integrity and a singular exemption from the epidemics of public opinion.

"His general information was large and varied. Probably no man now living was so familiar with the history of Georgia during the early part of this century. Some of his sketches of this period are in print, and have given pleasure to hundreds of readers.

"He held the Christian faith, was in the communion of a Christian church, and endeavored to walk justly among men and humbly and reverently before God.

"With due allowance for the sorrows which are inseparable from human existence, we may pronounce Judge Andrews a happy man. He had the esteem of his neighbors, a long, useful and honorable public career, a domestic life of rare felicity, a cheerful and vigorous old age, an easy dismissal from earth, with a consoling hope of heaven.

"In behalf of our profession, of which he was one of the most venerable members, we ask that this memorial of our departed friend shall be entered on the records of this Court.

"For the committee,

"A. T. AKERMAN, *Chairman.*"

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ADMISSIONS. See *Evidence*, 5.

ADMINISTRATORS AND EXECUTORS.

1. When a suit was brought against the administrator of A, charging that A, during his lifetime, had, as administrator of complainants' father, bought the lands of the estate at his own sale at less than their value; that the lands had, since A's death, been distributed to his heirs, and were now in the hands of B and C, as purchasers from said heirs with notice. The bill prayed that the deeds be canceled, and the lands be delivered up; or, if this could not be done, that the administrator of A account for their true value, as well as account generally to complainants for the devastation of his intestate as administrator of complainants' father. On the trial the defendant offered to prove that the land brought its true value, and that the sale was fair, and this evidence the Court refused to permit:
Held, That, as one object of the bill was to recover the true value of the land, this was proper evidence, and that as the jury had, by their verdict, failed to cancel the deeds and return the land, but found a money verdict, a new trial ought to be granted for this error of the Court. *Stripling et al. vs. Stripling et al.*..... 95
2. The claim set up by the executor in this case for counsel fees and cost paid under the circumstances proven, and when there was enough money in hand at the time (1863) to pay the same, and which was afterwards funded by the executor in Confederate bonds and lost, is not a sufficient reason. *Dorsey vs. Simmons et al.*..... 245
3. A sale of land by an administrator *cum testamento annexo*, made under an order of the Court of Ordinary, to pay the debts of the testator, where the estate is insolvent, discharges the land of the lien of the vendor for the unpaid purchase money, and the creditor

- must look to the proceeds in the hands of the representative of the estate. *Stallings, ex'r, vs. Ivey, adm'r, et al.*..... 274
4. A judgment was obtained against a party who died in the latter part of 1863, testate, authorizing his executors to sell, either publicly or privately, certain of his slaves. The executors qualified in December, 1863. The judgment creditor, soon after the qualification of the executors, urged them to sell the negroes, on account of the near approach of the Federal army. The executors refused, and hired out most of the negroes for 1864, but on the 6th of July, 1864, at the solicitation of the creditors, plaintiff included, defendants consented that they might be levied on and sold. A levy was made the next day on all the slaves, and they were taken in custody by the sheriff. In a few days, on account of threatened raids by the Federal forces, the negroes, by consent of the parties, were sent off by a mutual agent. In a short time they returned, but nothing further appears to have been done with them by the sheriff or either of the parties:
Held, That the executors are not liable to such levying creditor for not having sold the slaves prior to the levy, it having been only seven months from the time of their qualification as executors, and after the levy was made, the negroes were in the custody of the law at the instance of the creditor. *Simmons vs. Byrd et al.*..... 285
 5. Where an executor advances a support to the family of the deceased, although not specifically set apart by appraisers, he is entitled to be credited with it in accounting with the creditors and heirs, the burden being on him to show that it was a proper and necessary amount. *Ibid.*
 6. A judgment creditor of a testator cannot recover in an action on the case against an executor for not selling certain articles of personal property, when the creditor had it in his power to levy on the same, more especially if it be not shown that they were lost to the estate by not being sold by the executor, and the executor points them out to the creditor and directs him to levy. *Ibid.*
 7. Conceding the right of the plaintiffs to institute suit on the administrators bond for an *unliquidated demand*

- against the intestate*, which is left an open question in this class of cases, it is incumbent on the plaintiffs, when the plea of *plene administravit* is filed, to show sufficient assets in the hands of the administrators to meet the indebtedness, and the evidence being conflicting on this point, this Court will not interfere. *Mackie, Beattie & Co., vs. Glendenning, adm'r, et al.*..... 367
8. It is immaterial who makes the application for the twelve months' support for the family of the deceased, so that the representative of his estate has notice; therefore, such an application by the temporary administrator and the action of the Ordinary thereon, is not void as against creditors. *Ibid.*
9. The legal representative of a deceased partner may be sued in the same action with the survivor on a firm contract. *Garrard, ex'r, vs. Dawson.*..... 434
10. Courts of equity will not interfere with the regular course of an administration, by appointing a receiver to take the assets of the estate out of the hands of the administrator, unless the danger be imminent, and the charges in the bill be positive and specific. *Powell vs. Quinn et al.*..... 523
11. A factor or merchant holding a lien under section 1977, Irwin's Revised Code, when the maker thereof is dead, may, in order to preserve his lien and such priority as he may be entitled to, if any, in the distribution of his debtor's estate, make the affidavit required by law for its enforcement within twelve months after the qualification of the representatives of the estate, but there can be no levy of the execution issued thereon until after the expiration of the period of exemption from suit, allowed executors and administrators. *Moring vs. Flanders, adm'r.*..... 594
12. Where a bill was filed against a defendant as administrator, seeking a decree against him in such representative capacity, a demurrer to an amendment charging him individually, should have been sustained. *Smith, adm'r, et al., vs. Ardis, trustee.*..... 602

ALIMONY. See *Divorce*, 3, 4.

AMENDMENT.

1. The section of the Code of this State which declares that pleadings may be amended, whether in matter of

- form or of substance, provided there is enough in the pleadings to amend by, properly construed, means, that in order to admit of an amendment, a valid cause of action must be set forth in the original declaration. *Selma, Rome & Dalton R. R. Co. vs. Lacey*..... 106
2. In a suit by a widow, in this State, against a railroad company for the killing of her husband in the State of Alabama, the declaration cannot be amended after the lapse of one year from the alleged killing, for the reason that the statute law of Alabama limits the right to recover damages therefor to one year from the time of the death, and gives the right of action to the personal representative of the deceased. *Ibid.*
 3. In proceedings to foreclose a mortgage on realty, the Court permitted the plaintiff to amend the pleading so as to change the time mentioned therein as to the maturity of the note set forth, from January 1st, 1869, to January 1st, 1868:
Held, That such amendment did not introduce a new cause of action, nor was the defendant, on that account, entitled to a continuance, unless he showed, as is provided in section 3470 of the Code, "that he was less prepared for trial, and how, than he would have been if such amendment had not been made." *Jones vs. Henderson*..... 170
 4. Where a new trial was granted on an agreed state of facts, which judgment was reversed in this Court, it is competent for the movant to amend his motion before the judgment of this Court is made the judgment of the Superior Court, by showing that the facts were agreed to under a mistake as to their truth. *Daniel, adm'r, vs. Foster, adm'r*..... 303
 5. When a judgment has been *affirmed* on a statement of facts contained in the bill of exceptions, a different question might arise, but in this case the judgment was *reversed*, and the whole case was open for further investigation, and the truth may be shown. *Ibid.*
 6. Where the case stated in the body of the bill of exceptions is different from that stated in the certificate of the clerk thereto, and in the record, the error in the bill of exceptions is amendable so as to conform to the record. *Wooten et al. vs. Archer*..... 388
 7. When, amongst other defenses, pleas have been filed and stricken by the Court on demurrer, and such de-

- cision excepted to, and exception certified and entered on the minutes, it is competent for the defendant to amend the pleas on a new trial, which has been granted to the plaintiff. *Kimbrow vs. Bank of Fulton*..... 419
8. Where a bill was filed against a defendant as administrator, seeking a decree against him in such representative capacity, a demurrer to an amendment, charging him individually, should have been sustained. *Smith, adm'r, et al., vs. Ardis, trustee*..... 602
9. As an additional reason why the amendment should not be allowed in this case, it is apparent that the implied trust for which it seeks to make the defendant liable, is barred by the statute of limitations. *Ibid.*

APPEAL. See *County Court*, 3, 4.

ARBITRAMENT AND AWARD.

1. Where the plaintiffs proceeded to deliver cross-ties to the defendant under a written contract, one of the provisions of which was, in substance, that in case of any dispute touching the contract, the parties waive any right of suit or any other remedy in law or otherwise, and the decision of the chief engineer of the defendant shall, in the nature of an award, be conclusive on the rights and claims of said parties, and said chief engineer decided against the plaintiffs upon a claim presented by them, the award of the chief engineer was no more binding than the award of any other arbitrators selected by the parties. *Atlanta & Richmond Air-Line R. Co. vs. Mangham & Prickett*..... 266
2. The agreement of the parties should be construed to mean that they would abide a legal award. *Ibid.*
3. As the General Assembly could not pass a law impairing the right of parties to appeal to the Courts to vacate an illegal award, the chief engineer of a railroad company cannot, by his award under such a contract as is presented in this case, impair that right. *Ibid.*

ARGUMENT OF COUNSEL. See *Attorney*, 1.

ATTACHMENT. See *Claim*, 2.

ATTORNEY.

1. Under the provisions of the Constitution, it was error in the Superior Court to limit the defendant's counsel to a definite time in his argument before the jury, over his protest that he could not do justice to his client's case within the prescribed time. *Hunt vs. The State..* 255
2. Where, during the session of the Court, leave of absence for the term is granted to an attorney, and in a short time afterwards the attorney being present in Court, it was not error for the Judge, in order to prevent the continuance of a case in which such attorney was the leading counsel, to call the case for trial out of the regular order, unless it was made to appear that the attorney or his client was less prepared for trial on account of such leave of absence having been granted, or than they would be if the case were not called out of its order. *White et al. vs. Haslett et al., ex'rs* 280
3. The leave of absence of counsel does not extend to any other cases than those in which he appears to be of counsel on the dockets of the Court. *Daniel, adm'r, vs. Foster, adm'r*..... 303
4. Where a planter contracted a debt with a factor for provisions to make his crop, and gave a lien on his crop for the payment thereof, and of any attorney's fees for the enforcement thereof, and no action was taken to enforce the lien, but only a suit for the debt, claiming such fees as due for such suit:
Held, That the lien for attorney's fees was not a good lien, under the Act of 1866, authorizing liens to secure the payment of money due for provisions, etc., and that such fees are not recoverable in a suit at law for the debt. *Rodgers et al. vs. Hamilton*..... 604

AUDITOR.

Where the accounts which are the subject of a judicial investigation are complicated, the Court should appoint an auditor, to whom the matters in controversy should be referred. *Mayor & Council of Cuthbert vs. Brooks et al*..... 179

AUTREFOIS CONVICT. See *Criminal Law*, 21.

BANK-BILLS.

See *Limitations—Statute of*, 7, 8, 9.

BANKRUPTCY.

1. Where, after the levy of a mortgage *fi. fa.*, the property subject thereto was, by consent of the mortgagor and mortgagee, sold by auctioneers, and the proceeds paid into Court for distribution, the assignee of the mortgagor, proceedings in bankruptcy having been, previous to said sale, commenced against him, was entitled to the fund. *Morris vs. Davidson, assignee*..... 361
2. If the money in controversy had been raised by a judicial sale of the property of the bankrupt by the sheriff, on final process, in the enforcement of a lien of a prior date to the commencement of the proceedings in bankruptcy, there would have been no impropriety in the appropriation of the same to the satisfaction of the mortgage lien. *Ibid.*
3. After it is shown to the Court that the defendant had been declared a bankrupt, judicial notice will be taken of the fact that all his property and effects were vested by operation of law in his assignee. *Ibid.*
4. A State Court will not grant an injunction restraining a party from applying for the benefit of the Bankrupt Act under the bankrupt law of the United States. *Fillingin vs. Thornton*..... 384
5. Where an action was instituted in the name of a plaintiff who was adjudicated a bankrupt pending the suit, and the trustee selected by the creditors, with knowledge of such suit, did not have himself made a party, but consented that the suit proceed in the name of the original plaintiff, and no exception was made to the Court's allowing the case so to proceed, but the defendant excepted to the refusal of the Court to charge the jury that if they gave a verdict for the plaintiff, they should find for him for the use of the trustee:
Held, That it was not error in the Court to refuse so to charge. *Southern Express Co. vs. Connor* 415
6. The right of the trustee, if he has any, to the money when paid, or of the defendants, to be protected in paying it to the proper party, may be secured by proper steps being taken for that purpose. *Ibid.*

BILL OF EXCEPTIONS.

1. The signing of the bill of exceptions would necessarily make it the duty of the Judge to grant a *superse-*

- deas* of the judgment of the Court. *Malone vs. Hopkins, Judge*..... 221
2. There being no extraordinary facts set forth in the second motion for a new trial which would entitle the defendant to another hearing, the application for a *mandamus* to compel the Judge's certificate to the bill of exceptions, is refused. *Ibid.*
 3. Where a rule absolute is rendered against a sheriff for his failure to make the money on an execution placed in his hands for collection, the defendants in execution cannot except to the judgment of the Court. Should the sheriff fail to except, and thereafter attempt to enforce the execution against the defendants for his indemnity, they will then have the opportunity to protect themselves. *White et al. vs. Haslett et al., ex'rs*... 262
 4. When a reversal of a judgment is asked on account of an error alleged to have been committed by the Court on a question of fraud, which, it is claimed in the argument before this Court, was made and argued on the trial of the case, it should be distinctly made to appear in the record what that error was. If it be on the ground of error in the charge of the Court on the matter of fraud, the bill of exceptions should show the charge, and as it does not appear what the charge was on that point, the presumption is that it was correct. *Foster vs. Higginbotham*..... 263
 5. Though the documentary evidence, the exclusion of which was excepted to, may be not embraced in the bill of exceptions, no motion for a new trial having been made, the writ of error will not be dismissed, but the plaintiff will be heard on exceptions to the parol evidence. *Cutts vs Johnson*..... 370
 6. Where the case stated in the body of the bill of exceptions is different from that stated in the certificate of the clerk thereto, and in the record, the error in the bill of exceptions is amendable so as to conform to the record. *Wooten et al. vs. Archer*..... 388
- See *Practice in the Supreme Court.*

BOND FOR TITLE.

1. Land was sold at auction by S.; C. gave notice at the sale of a claim of title; S. replied that he would warrant the title, and would give to the purchaser a bond, with ample security, to indemnify him against

the loss of any sum that might be expended in improvements upon said property. Complainant purchased for \$1,010 00, and paid one-fourth of the purchase money in cash, and gave his three notes for the remaining three-fourths, taking the usual bond for titles from S. Two of these notes were paid at maturity. The remaining one was dishonored, because C. had commenced suit for the land. In the meantime, complainant had placed improvements thereon to the value of \$400 00. S. obtained judgment for the amount of the last note, has filed a deed to the land in the clerk's office, and has levied the execution upon the same. The Chancellor did not commit error in enjoining the sale, the injunction to be dissolved upon bond and security being filed by S. in the sum of \$1,000 00, conditioned to indemnify complainant against loss on his improvements in case of the failure of his title. *Seago et al. vs. Bass*.....

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2. Shorter sold land to Rice, against whom there was a judgment, and gave Rice a bond for title. Rice, without paying any of the purchase money, sold to Freeman, agreeing to transfer Shorter's bond, but not having it at the time, gave Freeman his own bond. This was in 1860. Freeman at once paid a portion of the purchase money to Rice and went into possession. A short time afterwards, Freeman paid a sufficient amount to pay Shorter, which was done with the money so advanced, leaving a portion still unpaid to Rice. Freeman subsequently, in 1862, forwarded this to Rice, who, by express, sent his own deed to Freeman. Freeman demanded the bond of Shorter, and Rice replied that he had given him that before. Nothing more was done until 1867, when the judgment creditor levied on the land as Rice's property, and after this levy, Freeman obtained Shorter's deed without warranty:

Held, That no title ever vested in Rice which was the subject of levy and sale. *Akin vs. Freeman*....

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3. Where one of two obligors in a bond for titles dies, the action for a breach of the bond, for not executing a deed as provided in the bond, may be brought in the name of the survivor. *Field, Jr., vs. Martin, adm'r*... 268
4. If the obligor in the bond, after its execution, sell the land to a third person, giving such person a bond for titles, puts him in possession, and receives the whole of the purchase money, it is a breach of the first bond,

and no demand for a deed is necessary before action is brought. *Ibid.*

5. Although it may be necessary for the plaintiff to aver in his pleadings the fact that he is the survivor, as well as the facts as to the second sale, in order to be entitled to prove them as a matter of right, yet if the testimony be admitted without objection, and no motion is made to withdraw it from the jury, he is entitled to the benefit of such testimony on a motion for a non-suit. *Ibid.*

BONDS. See *Officers*, 4.

CAPTURE. See *War*, 1.

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CERTIORARI.

1. Where the special Act establishing a County Court for the county of Dougherty made no provision as to the time within which the writ of *certiorari* to said Court should be applied for, the general County Court Act controls. *Pattillo vs. The State*..... 173
2. Where a criminal case was tried before the County Court of Dougherty county and the defendant, upon conviction, attempted to carry the same before the Superior Court by writ of *certiorari*, but the Judge refused to sanction the petition, which refusal is assigned as error, the Solicitor General of the Albany Circuit is entitled to represent the case in this Court. *Ibid.*
3. If illegal evidence be admitted by a Justice and no objection be made at the trial, both parties being represented by counsel, the admission of the evidence is not a good ground for a *certiorari*. *Southwestern Railroad Company vs. Cohen*..... 627

CHARGE OF COURT.

1. Where it was a question at issue whether such consent or direction was thus given, it was error in the Court to charge the jury as follows: "What they (the City Council) do, so far out of the line of their own business as to be evidently done in the execution of somebody else's job, if such owner was present and knew what was going on and made no objection, will be presumed to be done by consent or direction of such property owner, if nothing appears to the contrary.

But this presumption may be rebutted by any sufficient facts or circumstances, such as the owner of the property protested against it," etc. The jury had the exclusive right in this case to determine what presumption arose from the facts proven by the evidence.

Mitchell et al. vs. Mayor and Council of Rome..... 19

2. Where, upon the trial of a case arising under the forcible entry and detainer law, the jury reported to the presiding Justice that they could not agree upon a verdict, and the magistrate told them that they must agree or he would take them with him to Blakely, and the jury subsequently returned a verdict for the defendant, but upon being polled, two of them stated that they had consented to the verdict, but had not agreed to it, and the Justice received the verdict over the objection of the plaintiffs:

Held, That the proceeding was illegal. *Powell et al. vs. Lawson*..... 290

3. It is error for the Judge of the Superior Court, in his charge to the jury, to express or to intimate his opinion as to what has or has not been proved. *Deupree et al., ex'rs, vs. Deupree et al., caveators*..... 325

CLAIM.

1. There was sufficient evidence in this case, showing that the value of the land levied on was greater than the amount due on the execution, to authorize the damages to be assessed on said amount. *Kitchens, trustee, vs. Hutchins*..... 191
2. A claimant of property levied on by an execution issued on a judgment founded on an attachment cannot, on the trial of the claim, traverse the grounds on which the attachment issued. *Foster vs. Higginbotham*..... 263
3. The Act of 1871, Code of 1873, section 3741, authorizing the plaintiff in execution, where a "claimant" has withdrawn his claim, to go to the jury and recover damages, "in case it is made to appear that the claim was interposed for delay only," is not retroactive, so as to apply to claim cases then pending, it not appearing that any previous claim of the same property had been put in and withdrawn by the claimant. *Whitaker vs. David*..... 559

CONFLICT OF LAWS. See *Laws*, 1, 2, 3.

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CONSTITUTIONAL LAW.

1. Under the provisions of the Constitution requiring an "equitable apportionment of the compensation of the District Judges and attorneys between the counties comprising their districts," the tax required by the Act organizing said Court to "be levied in the several counties composing each Senatorial District * * * upon the taxable property returned therein, as together, will raise an amount sufficient to pay the salaries," etc., should be apportioned between said counties in proportion to the amount of taxable property returned in said counties, respectively. *Holtzclaw vs. Russ, Ordinary; Giles vs. Same*..... 115
2. The Relief Act of October 13th, 1870, making the payment of taxes upon debts contracted prior to June 1st, 1865, a condition precedent to a recovery thereon, is unconstitutional. *Gardner, trustee, vs. Jeter, adm'r; Same vs. Adams*..... 195
3. The Act, approved 20th February, 1873, imposing a special tax on wholesale dealers in malt liquors, is not in violation of the 27th section of Article I. of the Constitution of the State, which says "taxation on property shall be *ad valorem* only, and uniform on all species of property taxed." *Bohler vs. Schneider et al.* 195
4. Such a tax is a tax on a business, occupation or calling, as decided in *Burch vs. Mayor and Aldermen of Savannah*, 42 *Georgia*, 596, and, hence, is not a tax on the sale of liquors, which, by the 3d section of Article VI. of the Constitution, may be assessed for educational purposes. *Ibid.*
5. The Legislature, under the constitutional requisition to provide a thorough system of general education, may grant the power to county authorities or municipal corporations to levy a tax in aid of such system within their several territorial limits. *Board of Education, etc., vs. Barlow et al.*..... 232
6. A board of education may be appointed by the Legislature within such limits, with power and authority to use and appropriate the school funds thus raised in connection with what may be derived from the general fund provided by the State, and to superintend and control the schools that may thereby be established, the same being under such supervision of the State School Commissioner as by law may be provided. The fact

that such board may be created a body corporate in the Act appointing it, does not affect its right to exercise the authority given to it as a board of education. *Ibid.*

7. All of said Act, except that part thereof creating the local board of education, and giving it authority to establish, and regulate, and superintend, the public schools in said city, and to receive the proportionate part of the general State fund coming to said schools, is void, because said other portions of said Act refer to a subject matter different, not only from what is contained in the title, but from the other part of the same Act, to-wit: it grants power to the Mayor and City Council to levy a tax and issue bonds, and exempts the city from county taxation for public schools, and is obnoxious to that extent to that provision of the Constitution which says, "nor shall any Act or ordinance pass which refers to more than one subject matter, or contains matter different from what is expressed in the title thereof." *Ibid.*
8. Under the provisions of the Constitution, it was error in the Superior Court to limit the defendant's counsel to a definite time in his argument before the jury, over his protest that he could not do justice to his client's case within the prescribed time. *Hunt vs. The State..* 255
9. As the General Assembly could not pass a law impairing the right of parties to appeal to the Courts to vacate an illegal award, the chief engineer of a railroad company cannot, by his award under such a contract as is presented in this case, impair that right. *Atlanta and Richmond Air-Line R. R. Co. vs. Mangham & Prickett.....* 266
10. When a defendant sets up by plea that the contract is void under the Constitution, because it was made for the purpose of aiding and encouraging "the late rebellion," it is necessary that the facts should be stated in such plea, going to show how and in what way the contract was intended to give such aid and encouragement. *Kimbrow vs. Bank of Fulton.....* 419
11. The Limitation Act of 1869 is a general law, and has a general operation throughout the State as to that class of contracts specified in it, and, therefore, does not come within the purview of the 26th section, first Article, of the Constitution of 1868. *George vs. Gardner.....* 441

12. This Act does not impair the obligation of the contract ; it only affects the remedy. *Ibid.*

CONTEMPT. See *Sheriff*, 2, 3.

CONTINUANCE.

1. It is not error in the Judge of the Superior Court to refuse to continue a criminal case on the ground of the absence of a witness, it not appearing that the witness had been subpoenaed, and no reason is given why he was not. *Cogswell vs. The State*..... 103
2. In proceedings to foreclose a mortgage on realty, the Court permitted the plaintiff to amend the pleading so as change the time mentioned therein as to the maturity of the note set forth, from January 1st, 1869, to January 1st, 1868 :
Held, That such amendment did not introduce a cause of action, nor was the defendant, on that account, entitled to a continuance, unless he showed, as is provided in section 3470 of the Code, "that he was less prepared for trial, and how, than he would have been if such amendment had not been made." *Jones vs. Henderson*..... 170
3. Where the defendant was placed on trial, and a mistrial was ordered on account of the sickness of one of the jury, it was not error in the Court to place said defendant again on trial during the same term of the Court. *Malone vs. The State* 210
4. A motion for continuance was submitted upon the ground that the defendant was too sick to engage in the trial, and the Court summoned two physicians, who disclosed, under oath, that he was suffering from the effects of alcohol, from nervous derangement; and on this statement, passed the case to a time indicated by the physicians. When he was again called on to announce, the same motion was submitted. The Court asked his counsel if his condition had grown worse. They replied that it had not. Upon their stating that they had nothing further to offer in support of the ground of alleged sickness, it was not error in the Court to overrule the motion. *Ibid.*
5. Where the movements of a witness are evidently controlled by the friends of the defendant, and the Judge certifies that he had no doubt, from all that had oc-

curred in the case, that the motion for continuance was made for delay only, and no compulsory process had been applied for to compel her attendance, this Court will not interfere with the discretion of the Court below, exercised in overruling the motion for continuance, on account of the absence of said witness.
Ibid

6. The Court has discretion, where a defendant is placed on trial at the term of the Court at which the indictment was found, whether to sustain a motion for a continuance or not, even though the requirements of section 3471 of the Code have been complied with.
Ibid.

CONTRACTS. See *Laws*, 4.

CONTRIBUTION. See *Lien*, 13, 14.

CORPORATIONS.

1. Where a charter, granted by the General Assembly to a private corporation, is silent as to the time of its continuance, it will expire thirty years from its date. *West End and Atlanta Street R. R. Co. vs. Atlanta Street R. R. Co.*..... 151
2. It is a well established rule of law that an exclusive grant in derogation of common rights, as well as in all cases in which exclusive rights are claimed under a legislative grant to a corporation, that such grant should be strictly construed, and that nothing is to be intended beyond the express words contained in it.
Ibid.
3. On the 23d of February, 1866, the General Assembly of this State passed an Act incorporating the Atlanta Street Railroad Company. By the 2d section of said Act it is declared, "That said company shall have exclusive power and authority to survey, lay out, construct and equip, use and employ, street railroads in the city of Atlanta, subject to the approval of the City Council thereof, for each route selected, first had and obtained, before the work thereon shall be commenced :
Held, That there are no words in this charter which grant to the complainant's company the unconditional, exclusive power and authority to construct and use street railroads in *all* of the streets of the city of At-

lanta, but that the grant is limited and restricted to *each route* that may be selected by the company *in* the streets of the city of Atlanta, which shall be approved by the City Council thereof. *Ibid.*

4. The complainant cannot derive any benefit from the general ordinance of the City Council, granting authority to its company to construct street railways on any street in the city, and across the bridge on Broad street, because that ordinance is void, not having been passed in pursuance of the requirements of the charter, as there had been no route for a street railway selected by the company and submitted to the City Council for its approval on any street in the city, as prescribed by the charter of the company, and until that had been done, the City Council had no power or authority, under the charter, to give its approval in advance before any route had been selected by the company and submitted for its approval. *Ibid.*
5. The laws which exist at the time and place of the making of a contract, enter into and form a part of it. *Ibid.*
6. Where exclusive authority is vested by the General Assembly in a private corporation by its charter, under the general law of the State, said body retains the power to modify or restrict said exclusive grant. *Ibid.*
7. The power to withdraw an entire franchise necessarily includes the power to modify or restrict the exercise of it. *Ibid.*
8. On December 20th, 1866, complainant was incorporated and authorized to construct a railroad from a point within the corporate limits of the city of Savannah, to the Isle of Hope and Skidaway Island, and to construct branch railroads, etc. On July 22d, 1868, the Mayor and City Council of Savannah passed an ordinance granting to complainant the exclusive right of way for ten years, and for such further time as the Legislature might grant, over all the streets in the city of Savannah (with certain exceptions,) for the purpose of connecting its line of railway with the streets of said city by horse railway cars, etc., and to construct a street railroad and such branches as may be necessary in and along said streets, etc. It was further declared by said ordinance that complainant should, within three years from the date thereof, have their street rail-

way in running order through certain streets, on penalty of forfeiture of the franchise. On September 24th, 1868, the General Assembly passed an Act confirming to the complainant all the rights conferred on it by the aforesaid ordinance, and extending the enjoyment of the franchise to thirty years. On October 10th, 1868, the defendant was incorporated and authorized to construct a railroad from such point in the city of Savannah as might be authorized by the Mayor and Aldermen of said city to any point or points on Wilmington Island. This grant to the defendant to construct a railroad between the points designated in said Act, does not necessarily interfere with the complainant's franchise to use and operate horse railway cars in the streets of the city, for the purpose of connecting its line of railway with said streets. *Savannah, S. & S. R. R. Co., vs. Coast Line R. R. Co.*..... 202

9. The Legislature, under the constitutional requisition to provide a thorough system of general education, may grant the power to county authorities or municipal corporations to levy a tax in aid of such system within their several territorial limits. *Board of Education, etc., vs. Barlow et al.*..... 232

10. A board of education may be appointed by the Legislature within such limits, with power and authority to use and appropriate the school funds thus raised, in connection with what may be derived from the general fund provided by the State, and to superintend and control the schools that may thereby be established, the same being under such supervision of the State School Commissioner as by law may be provided. The fact that such board may be created a body corporate in the Act appointing it, does not affect its right to exercise the authority given to it as a board of education. *Ibid.*

11. The 18th section of the Act of February 22, 1873, entitled "An Act to amend and revise the several Acts granting corporate authority to the city of Americus, and to establish and consolidate the same, and for other purposes therein named," is inconsistent with the third section of the Act of February 13th, 1873, entitled "An Act to establish a permanent board of education for the city of Americus, and to incorporate the same, and for other purposes," in so far as the latter

Act provides for levying a tax, and to that extent said third section is repealed. *Ibid.*

12. All of said Act, except that part thereof creating the local board of education, and giving it authority to establish, and regulate, and superintend, the public schools in said city, and to receive the proportionate part of the general State fund coming to said schools, is void, because said other portions of said Act refer to a subject matter different, not only from what is contained in the title, but from the other part of said Act, to-wit: it grants power to the Mayor and City Council to levy a tax and issue bonds, and exempts the city from county taxation for public schools, and is obnoxious to that extent to that provision of the Constitution which says, "nor shall any Act or ordinance pass which refers to more than one subject matter, or contains matter different from what is expressed in the title thereof." *Ibid.*

13. The board of education created by said Act of 13th of February, 1873, has no authority of law to require the Mayor and City Council of Americus to levy and collect a tax as is provided by said Act. Nor can said Mayor and Council levy and collect a tax as a public school fund, except by authority of the 18th section of the Act of 22d of February, 1873, which tax, if collected, may, by virtue of said section, be used at the discretion of the Mayor and City Council for the purpose for which it was levied. *Ibid.*

See *Municipal Corporations*.

COUNTY COURT.

1. Where the special Act establishing a County Court for the county of Dougherty made no provision as to the time within which the writ of *certiorari* to said Court should be applied for, the general County Court Act controls. *Patillo vs. The State*..... 172
2. Where a criminal case was tried before the County Court of Dougherty county, and the defendant, upon conviction, attempted to carry the same before the Superior Court by writ of *certiorari*, but the Judge refused to sanction the petition, which refusal is assigned as error, the Solicitor General of the Albany Circuit is entitled to represent the case in this Court. *Ibid.*

3. Where a verdict was rendered in the County Court prior to its abolishment, and an appeal entered after, but within the four days allowed by law, the judgment entered against the security on appeal on the second trial, was valid. *Colquitt & Baggs et al. vs. Oliver*.... 284
4. The acceptance of the appeal bond by the County Judge was a ministerial and not a judicial act; it was nothing more than the transmission of the unfinished business of the County Court to the Superior Court. *Ibid.*

COUNTY MATTERS.

1. *Prima facie*, an Ordinary of a county has no right to settle a debt due the county by a defaulting public officer, by taking land in payment of the debt, as the property of the county, and in a suit in the name of the Ordinary to recover the land, the burden is upon the Ordinary to show that it was necessary to take the land to save the debt, or that the land was taken for some specific public purpose for which the county authorities may buy land for the county. But if this be shown, as that it was necessary to save the debt, or the land was bought for such specific purpose, and under such circumstances as would give the Ordinary the right to buy, that makes out a case where the Ordinary may sustain the action, other proper title being shown. *Phipps vs. Morrow, Ordinary, et al.*..... 37
2. It was competent for the General Assembly, after the year 1868, to provide for the election and succession of the county officers of the State, as was done under the 3d section of the Act of 1872, and an Ordinary elected under this law and commissioned by the Governor, will not be ejected upon the relation of one claiming to have been elected under the provisions of the 1346th section of the Code. *Crisp, Solicitor General, ex rel., vs. Brown*..... 190
3. A county being suable by law in the State tribunals, is, though a portion of the State, subject to suit in the United States Courts. *Board of Commissioners, etc., vs. Hurd*..... 462

CRIMINAL LAW.

1. There was no error in admitting the record of the indictment and conviction for the opprobrious words. It

- went to show a motive and to explain the threats and words of the prisoner. *Kelly vs. The State*..... 12
2. It is not error in the Judge of the Superior Court to refuse to continue a criminal case on the ground of the absence of a witness, it not appearing that the witness had been subpoenaed, and no reason is given why he was not. *Cogswell vs. The State*..... 103
3. Where, on a motion for new trial, one of the grounds insisted on was, that one of the jury who tried the cause was asleep during a portion of the trial, and no affidavits were filed with the motion, but it was proposed to show by parol, at the hearing, that such was the fact, and the Court refused to hear the witnesses, and refused also the new trial:
Held, That the proof ought to be made as a part of the motion, in writing, by affidavits attached, and that a new trial ought not, in any event, to be granted on such a ground unless it affirmatively appeared that the prisoner and his counsel did not know the jurymen was asleep before the jury retired to find a verdict.
Ibid.
4. When a prisoner was regularly arraigned and pleaded not guilty, and was tried and found guilty and a new trial granted, it is not necessary that he should be again arraigned on the new trial. *Ibid*.
5. The circumstances connected with the perpetration of the offense charged, as testified to by the victim of the rape—the degree of resistance on her part—the fact that no alarm or outcry was made, the place being where it could have been easily heard—no marks of violence having been exhibited, and the injury being concealed for several days after the opportunity of making complaint, and no proof of any complaint ever having been made except by the party said to be injured, together with the fact that no legal step was taken to punish the outrage until pregnancy was discovered, make this a case where the crime charged was not sufficiently proven, under the law, to justify a verdict of guilty. *Crockett vs. The State*..... 185
6. Where the defendant was placed on trial, and a mistrial was ordered on account of the sickness of one of the jury, it was not error in the Court to place said defendant again on trial during the same term of the Court. *Malone vs. The State*..... 210

7. A motion for continuance was submitted upon the ground that the defendant was too sick to engage in the trial, and the Court summoned two physicians, who disclosed, under oath, that he was suffering from the effects of alcohol, from nervous derangement, and on this statement, passed the case to a time indicated by the physicians. When he was again called on to announce, the same motion was submitted. The Court asked his counsel if his condition had grown worse. They replied that it had not. Upon their stating that they had nothing further to offer in support of the ground of alleged sickness, it was not error in the Court to overrule the motion. *Ibid.*
8. Where the movements of a witness are evidently controlled by the friends of the defendant, and the Judge certifies that he had no doubt, from all that had occurred in the case, that the motion for continuance was made for delay only, and no compulsory process had been applied for to compel her attendance, this Court will not interfere with the discretion of the Court below, exercised in overruling the motion for continuance, on account of the absence of said witness. *Ibid.*
9. The Court has discretion where a defendant is placed on trial at the term of the Court at which the indictment was found, whether to sustain a motion for a continuance or not, even though the requirements of section 3471 of the Code have been complied with. *Ibid.*
10. An indictment found by a grand jury, constituted by filling up the places of the drawn grand jurors who failed to appear, by tales jurors, as provided by the Act of 1869, is valid. *Ibid.*
11. A challenge to the array of jurors put upon defendant, on the ground that the various panels have been drawn from a box containing the names of only one thousand persons, whereas the number of persons in the county subject to jury duty, from whom he has a right to select, amount to four thousand, was properly overruled, where no proof was offered in support thereof. *Ibid.*
12. This Court announces to the public, with all the emphasis its judgment can impart, that provocation by words, threats, menaces or contemptuous gestures will, in no case, be sufficient to free a person, who kills an-

- other by shooting him, from the guilt and crime of murder. *Ibid.*
13. The reasonable doubt, which would acquit the defendant, must be pertinent to the matter in issue, and arise out of the evidence, or the want of evidence. *Ibid.*
 14. The charge that drunkenness could be looked to, to ascertain and determine the condition and state of the defendant's mind, and to throw light upon the inquiry whether there was malice, was quite as favorable to the defendant as he had a right to expect. *Ibid.*
 15. Whether the defendant and the deceased were strangers to each other was a question of fact for the jury, and if they were, and one was killed by the other without any considerable provocation, the law will imply malice. *Ibid.*
 16. The verdict should be read to the jury before they are polled. *Ibid.*
 17. If the bailiff who attended the jury, ate and slept in the same room with them, it was incumbent on the defendant to have shown it by competent evidence. *Ibid.*
 18. Under the provisions of the Constitution, it was error in the Superior Court to limit the defendant's counsel to a definite time in his argument before the jury, over his protest that he could not do justice to his client's case within the prescribed time. *Hunt vs. The State* 255
 19. If the evidence contained in the record had been so decidedly strong as to have required the verdict rendered by the jury, it might not have been interfered with for the error complained of, but the evidence is conflicting as to whether the stabbing was done in self-defense; and inasmuch as the defendant was prevented by the Court from having the privilege and benefit of counsel in his defense, as contemplated by the Constitution, the judgment of the Court below is reversed. *Ibid.*
 20. On the trial of an indictment for the offense of shooting at another, the defendant proposed to prove that a short time after the shooting, there was, at a grocery near by, to which both defendant and prosecutor had gone just after the shooting had occurred, a considerable number of negroes who were excited and were

threatening to mob the defendant. There was no evidence, nor was it offered to be proved that any such threat was made before the shooting, and in fact it appeared that the excitement must have been caused by the shooting and wounding of the prosecutor:

Held, That such testimony could not have illustrated the issue as to the guilt or innocence of the defendant for shooting at the prosecutor prior to any such excitement or threats as were proposed to be proved, and it was not error in the Court to reject such evidence. *McAlister vs. The State*..... 306

21. The plea of *autrefois convict* to an indictment for a misdemeanor in the Superior Court may be sustained by proof of such former conviction before an Inferior Court having jurisdiction of the offense, unless it appear that such indictment was found prior to the prosecution in the Inferior Court, and that the defendant had been arrested under it. *Mize vs. The State*..... 375

22. According to the decision in *Johnson vs. The State*, rendered at the January term, 1873, where the indictment is for arson, in burning an occupied dwelling house, other than in a city, town or village, and the jury render a verdict of guilty, with a recommendation to the mercy of the Court, such a verdict is uncertain and illegal, and should be set aside. *West alias Johns vs. The State* 451

23. A verdict in such cases, where the defendant is convicted, should be a general verdict of guilty, or guilty, with a recommendation that he be confined in the penitentiary for life. The jury may, in all capital cases, except for murder, recommend the commutation, whether the conviction is or is not founded solely on circumstantial testimony. *Ibid*.

24. The killing of a human being, even in the heat of passion, is murder, if the slayer have no just cause for his anger, or if, after the provocation, and before the killing, there be sufficient time for passion to cool and reason to resume its sway. *Smith vs. The State*..... 482

DAMAGES.

1. In an action by a plaintiff against a corporation for damages, it was error in the Court to charge the jury, "that in estimating the damages they could take into consideration the expenses to which plaintiff had been put in

- and about his said suit," there being no proof of what such expense was, and such expenses are only recoverable "when the defendant has acted in bad faith, or has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense." *Mayor and Aldermen of Savannah vs. Waldner*..... 316
2. It is only in actions of *tort*, and where there are circumstances of aggravation, that a jury is authorized to give punitive damages, and whether such circumstances do, in fact, exist, is a question for the jury, and not for the Court, to decide. *Ransone vs. Christian*... 491
3. If, in an action for a libel, the defendant pleaded justification, and failed to make out his plea, the plea itself is a circumstance which the jury may, in fixing the amount of damages, consider as aggravating the *tort*, but the jury is not bound, in all cases, so to consider it; on the contrary, if the defendant show strong grounds in support of the charge he has made, though he does not fully support his plea, the jury may, if it sees fit, consider these grounds as mitigating circumstances, and reduce the damages accordingly. *Ibid*

DEED.

1. Where the description in a deed is so ambiguous as to leave it doubtful whether a certain piece of land was intended to be included in what was conveyed, parol evidence is admissible to identify the premises. *Hulsey et al. vs. Clark*..... 99
2. Where the plaintiff claimed title to land under a deed which was thirty years old, lacking three months, when the defendant's adverse possession under a deed commenced, which last deed was attacked by the plaintiff for forgery, it was error in the Court to charge the jury that "it was incumbent on the plaintiff to show that he had been in possession of the land in dispute, under the deed, or he would be driven to prove the execution of the deed as at common law, that is, he must prove by the subscribing witnesses, or one of them, the execution of the deed," as there was no adverse possession of the land inconsistent with the deed for nearly thirty years, and not then, if the title under which the defendants claimed was a forgery or fraudulent, and they had notice of it. *Turner et al. vs. Tyson et al.*..... 165

3. Where neither deed is recorded within the time prescribed by law, the oldest has the preference, and not the one first recorded. *Ibid.*
4. Where the question on trial was whether certain deeds were forgeries, and evidence of the insanity of the grantor at a certain time was admitted as tending to show that he did not execute the same, it was error in the Court to charge the jury that if the grantor was insane at the time of their execution, the deeds were void. *Ibid.*
5. Where a deed is attacked for forgery, the admission of one of the heirs of the grantor, said heir having since died, as to its genuineness, being apparently against his interest, is incompetent evidence. *Ibid.*

DELIVERY. See *Factors*, 2.

DEMAND. See *Pleadings*, 2. *Railroads*, 5.

DISTRICT COURT. See *Officers*, 1, 2.

DIVORCE.

1. The verdict in this case, granting a total divorce, was not contrary to the evidence, or to law, or to the weight of the evidence, and where the property which is given by the verdict to the wife and children—she being the libellant—was the property of the wife at the time of filing the libel, it is not on that ground liable to be objected to by the husband. If the giving to the children an interest in such property could be excepted to, it was a matter of which the libellant only could complain, and not the defendant. *O'Halloran vs. O'Halloran*..... 301
2. An infant married woman may maintain an action for a divorce. *Besore vs. Besore*..... 378
3. The discretion of the Superior Court as to the amount allowed as temporary alimony will not be interfered with unless abused. *Ibid.*
4. Temporary alimony for the wife should embrace a reasonable allowance for her support pending the litigation, taking into consideration her physical condition and ability to contribute something towards her own support. *Ibid.*

DORMANT JUDGMENT. See *Judgment*, 1, 10.

DRUNKENNESS. See *Criminal Law*, 14.

EDUCATION. See *Corporations*, 9, 10, 11, 12, 13.

EJECTMENT.

The sheriff, under a writ of possession based upon a judgment rendered in an action of ejectment, has no authority to receive an affidavit from a person not a party to said suit, to the effect that she did not hold possession of the land as tenant under the plaintiff or defendant in ejectment, "or any one else." *Powell et al. vs. Lawson*..... 290

See *Deed*, 1, 2.

EQUITY.

1. When A filed a bill against the City Bank of Macon, charging that he was the holder of a mortgage made by B on certain real estate, founded on a valuable consideration; that the said City Bank was also the holder of a mortgage made to it by B upon the same property; that the mortgage to the bank was given to secure the payment of a note made to the bank by B for the loan of money at more than seven per cent. per annum, and was therefore null and void; that the mortgage to the bank was of older date than the mortgage to A; that the junior mortgage contained upon its face notice of the mortgage to the bank; that the mortgage to the bank had been regularly foreclosed by rule nisi, notice and judgment of the Superior Court of the county of Putnam, where the land was situated, and ordered to be sold to satisfy it; that B was insolvent, and that unless A could set aside this illegal mortgage, he would lose his money. The bill prayed an injunction. The defendant, on the rule to show cause, denied there was equity in the bill, and insisted that if the complainant had any remedy, it was at law, under sections 3903 and 3892 of the Revised Code. The Judge refused the injunction, and the complainant excepted:

Held, That there was no error in the judgment of the Court refusing the injunction. Admitting that the note, to secure which the mortgage to the bank was given, is null and void for usury, if the complainant

has any remedy, it is only under sections 3903 and 3892 of the Code, and as that remedy, if it applies to his case, is made ample and complete, equity has no jurisdiction. *Gatewood vs. City Bank of Macon et al.* 45

2. When A filed a bill in equity against C's administrator, alleging that he (A) and B had, during the late war, traded lands; that B was at the time indebted to C for a part of the purchase money of the land, but C was refusing Confederate money, so that the debt could not be paid; that for this reason A only gave to B his bond for titles to the land he let him have; that B afterwards traded the land he got of complainant to D and transferred the bond; that shortly after this, complainant received a message from C, then in life, that he might safely make a deed to D, as he (C) was now willing to take Confederate money from B for his debt; that knowing positively that B had the money and was ready to pay, he, (A,) in consequence of this message, made titles to D and took up his bond; that he is informed that B soon after tendered the Confederate money to C, who refused it; that C had died, and his administrator, the defendant, was proceeding to levy his judgment, which was a judgment on the foreclosure of a mortgage on the land. The bill prayed a perpetual injunction against the mortgage, and a temporary injunction until the trial. The Court granted the temporary injunction. C's administrator, the defendant, answered the bill, denying, on his information and belief, the sending of the message and the tender of Confederate money, and moved to dissolve the injunction and to dismiss the bill for want of equity. The Court dissolved the injunction and dismissed the bill:

Held, That there is equity in the bill, for which complainant has no remedy at law, and that it was error to dismiss the bill. *Lee vs. Clark, ex'r.*..... 81

3. The defendants cannot by cross-bill, claim damages from the complainant who resides in a different county, alleged to have been sustained by the wrongful suing out of the writ of injunction in said case. *Husseys, adm'rs, vs. Neal et al.*..... 160

4. Under the facts of this case there was equity in the cross-bill of the defendants, and the Court did not err in refusing to sustain the demurrer to the same. *Ibid.*

- b. A bill was filed by a purchaser at a sheriff's sale,

under a common law *fi. fa.* against a former purchaser of the same land at a sale by virtue of a tax *fi. fa.*, to set aside and cancel the deed made to such former person. The issue thus made, and the finding thereon by the jury in favor of complainants, did not authorize the Chancellor to decree the cancellation of the deeds, both of defendants and complainants, and to direct that the land be resold under the common law *fi. fa.* If the defendant in execution, or his creditors, had any equities in the premises requiring a resale, they should have been parties to the proceedings, which could have been done on their own motion. *Burke et al. vs. Wilkins et al.*..... 257

6. When a bill was filed, seeking the partition of a lot of land between tenants in common, and an account, the complainants claiming seven-eighths and the defendants one-eighth, and fails to show whether the defendants were in possession of a greater portion of the land than their share, or whether said defendants were holding adversely to the complainants, or anything going to show a liability on the part of the defendants, as tenants in common, to account for the rents and profits of the land, a demurrer thereto was properly sustained. *Landsdale et al. vs. Brown et al.*..... 278
7. If the other allegations in the bill had been sufficient, the number of parties defendant might have been a good ground for equity jurisdiction to prevent a multiplicity of suits. *Ibid.*
8. On August 10th, 1859, a verdict was rendered in favor of B. and wife against R. "for the premises in dispute, and \$200 00 for rent," on a bill filed by B. and his wife against R., claiming one undivided half of a certain lot of land, to-wit: one hundred and one acres. Upon this verdict a decree was entered in favor of the complainants for fifty-one and a half acres off the south-east corner, and fifty-one and one-half acres off the northwest corner of said lot, also for the rent, and directing the sheriff to place the complainants in possession. An attempt was made to divide the lot in accordance with this decree, but R. objected, as it interfered with his possession which he had held for many years under his deed, and under a division had between him and B. and wife, many years before the filing of said bill. Nothing more appears to have been done towards the enforcement of said decree, except that R. paid the

\$200 00 for rent and abandoned all that part of the land which B. and wife claimed under the original division. On February 2d, 1870, a writ of possession was ordered to be issued on said decree to put one S., who was not a party to the same, in possession of the southeast corner of said lot. R. filed his bill to reform said decree and to enjoin said writ of possession. The Court charged the jury that if R. knew of the decree, he had delayed too long in filing his bill to reform the same, to be allowed the relief prayed for. This charge was error. *Renew vs. Darley et al.*..... 332

9. The statute of limitations applicable to bills of review was suspended from November 30th, 1860, to July 21st, 1868. *Ibid.*

10. A and B, mechanics, sued out an execution, which was void under the foregoing rule, against T. A., and a house built under a contract with him. The execution was levied on the house. It was sold by the sheriff and bought by Wooten & Taylor, the defendants. The lot on which the house stood belonged to E. A., who brought ejectment against Wooten & Taylor. The defendants set up, by plea, that E. A. lived adjoining to the lot where the house was being built, and never gave notice of her right or title, and that from such default on her part, the builders would, in equity, have a lien on the house for the unpaid portion of their claim, and that the purchasers at sheriff's sale should be subrogated to their rights and allowed the amount that was due the builders. T. A., who had the house built, was not a party to the cause, nor did it appear what the debt against him was, except by the illegal proceedings to enforce the lien claimed:

Held, That even if the defendants could, with proper parties and proof, assert such an equity, yet it was necessary that T. A. should have been made a party, and the amount of his debt due the builders should have been shown by evidence other than the void proceedings to enforce the mechanic's lien. *Wooten et al. vs. Archer.* 388

11. Courts of equity will not interfere with the regular course of an administration, by appointing a receiver to take the assets of the estate out of the hands of the administrator, unless the danger be imminent, and the charges in the bill are positive and specific. *Powell vs. Quinn et al.*..... 523

12. Land was devised to the wife for life, and at her death to be equally divided between two daughters, L. and E. Judgments were obtained against the representative of the estate on debts due by the testator. After the rendition of the judgments and death of the tenant for life, the land was equally divided between the daughters, L. and E. Subsequent to this L. mortgaged the portion she received to C. Plaintiffs in the judgments caused their executions to be levied on the share received by E. The executions not being satisfied from the proceeds of this levy, they were levied on the land of L. C., the mortgagee, filed a bill to enjoin the sale under this levy, on the ground, amongst others, that plaintiffs made an agreement with E. or those holding under her, whereby they remitted all claims on her land for \$1,000 00, when the same was worth nearly four times that sum, and that thereby the whole of the balance of the executions, amounting to about \$6,000 00, is sought to be enforced against the land of L., on which he holds the mortgage:

Held, That the right of contribution existed between L. and E. as to the payment of the executions, and if the creditors discharged all claims on the land of E, for less than the proportionate share of her liability to contribute to L., C., as the creditor of L., by mortgage, which has been foreclosed, is entitled to assert her rights, as well as his own equities arising out of such facts, against such creditors. *Compton & Sons vs. Pitman et al.*..... 612

13. If the facts recited are established on the final hearing, and a sufficient showing was made on the application for injunction, to entitle complainant to such hearing—only one-half of the amount of the executions—not deducting the credit of \$1,000 00 collected of E., should be enforced against the land mortgaged to C. The levy should proceed and the land be sold, and the amount it may bring, in excess of one-half of the executions, should be impounded by direction of the Chancellor to abide the final determination of the cause. *Ibid.*

14. As special verdicts may be found upon the trial of equity causes, there was no error in overruling the motion for a new trial as to some of the defendants, and granting it as to others. *King et al. vs. King et al.*..... 622

ESTOPPEL. See *Judgment*, 8.

EVIDENCE.

1. There was no error in admitting the record of the indictment and conviction for the opprobrious words. It went to show a motive, and to explain the threats and words of the prisoner. *Kelly vs. The State*..... 12
2. When a suit was brought against the administrator of A, charging that A, during his lifetime, had, as administrator of complainant's father, bought the lands of the estate at his own sale at less than their value; that the lands had, since A's death, been distributed to his heirs, and were now in the hands of B and C, as purchasers from said heirs with notice. The bill prayed that the deeds be canceled, and the lands be delivered up; or, if this could not be done, that the administrator of A account for their true value, as well as account generally to complainants for the devastation of his intestate as administrator of complainant's father. On the trial, the defendant offered to prove that the land brought its true value, and that the sale was fair, and this evidence the Court refused to permit:
Held, That, as one object of the bill was to recover the true value of the land, this was proper evidence, and that, as the jury had by their verdict failed to cancel the deeds and return the land, but found a money verdict, a new trial ought to be granted for this error of the Court. *Stripling et al. vs. Stripling et al.*..... 95
3. Where the description in a deed is so ambiguous as to leave it doubtful whether a certain piece of land was intended to be included in what was conveyed, parol evidence is admissible to identify the premises. *Hulsey et al. vs. Clark*..... 99
4. When, on the trial of a claim case, it appears that the defendant, *after the date of the judgment*, had conveyed the land to the claimant, and Jackson was introduced to prove that some years previous to the date of the judgment he had bought the land from defendant and paid the consideration money, but had taken no deed or other writing, and that the deed made to the claimant by defendant was made at his (the witness') request; that he had sold the land to the claimant and received the consideration, and the defendant had, at his request, made the deed to the claimant, in pursu-

ance of the purchase and payment several years before the judgment:

- Held*, That the testimony was not illegal under the rule that express trusts must be in writing. *Johnson vs. McComb, ex'r*..... 120
5. Where a deed is attacked for forgery, the admission of one of the heirs of the grantor, said heir having since died, as to its genuineness, being apparently against his interest, is competent evidence. *Turner et al. vs. Tyson et al.*..... 165
6. Though the statement of an obligee in a bond for titles, made to his assignee at the time of its transfer, to the effect that the purchase money was payable in Confederate currency, is not admissible as evidence against the obligor, yet if there be other testimony sufficient to authorize the jury to scale the claim under the ordinance of 1865, and they do so scale it, this Court is not bound to grant a new trial, especially if substantial justice appears to have been done. *Williams et al., ex'rs, vs. Phipps.* 175
7. Where a plaintiff, in 1869, sued two joint and several makers of a promissory note, executed in 1863, due one day after date thereof, and after the 1st day of January, 1870, dismissed the action against one of the defendants and obtained a judgment against the other, there being no plea filed by the latter, such dismissal was not a discharge of the defendant against whom the judgment was rendered. If the party against whom judgment was obtained was a surety and the other was principal, the rule would be different. *McCarter vs. Turner et al.*..... 309
8. On the hearing of a bill filed by such defendant, praying an injunction against the judgment and execution issued thereon, and one of the issues being whether the defendant against whom the judgment was obtained, was the security of the party who was dismissed from the suit, the note not showing that fact, parol testimony is admissible to show what was the understanding and agreement of the parties to the note on that point, at the time of its execution. *Ibid.*
9. Where L., in the presence of B., deposited a cotton receipt of B. with K. to hold for L. as collateral security for a debt due by B. to L., it is not competent on the trial of a garnishment against K., sued out on an

- attachment against S., to prove by the sayings of B. that the debt for which the deposit was made as collateral, was an account made by B. with S. Nor was the answer of B. to a summons of garnishment, served upon him in the same case, admissible to prove that fact. *Strupper vs. King*..... 328
10. Johnson sued Cutts on a contract dated January 1st, 1868, to deliver to plaintiff one hundred and sixty-two and a half bales of cotton in the fall of 1868, of the crop grown that year. On the trial, defendant proposed to prove by parol that Johnson sold land to one Carlton in 1866 for one hundred and eighty bales of cotton, which were to be delivered in the fall of 1867, and gave bond for titles; that in December, 1866, Charlton transferred the bond to defendant, who afterwards executed to plaintiff the contract sued on, and that the last contract was only a renewal or extension of Charlton's contract, and that defendant was only to pay plaintiff what was due on Charlton's contract for the portion of cotton not delivered by Charlton, estimating it at its value at the maturity of Charlton's contract:
Held, That the testimony was inadmissible. *Cutts vs. Johnson*..... 370
11. Where a Confederate contract was the subject of investigation before the jury, it was error in the Court to refuse to allow the plaintiff to prove the price of corn and other articles at the date of such contract, as it would have tended to have shown the value and purchasing power of Confederate money at that time, so as to have enabled the jury to adjust the rights of the parties, under the provisions of the Ordinance of 1865, on principles of equity. *Johnson vs. Gray, ex'r*..... 423
12. When the maker of a note, dated in 1863, pleads, that the same was payable in Confederate currency, and the only evidence on the trial is the date of the note, and that the consideration expressed therein was cotton in the gin-house of the payee, and his growing crop of cotton, the defendant being a competent witness, although the payee is dead, his evidence is the best evidence which exists of the fact sought to be proved, and should be produced. *Hudson, adm'r, vs. Spence*..... 479
13. The testimony of a witness was taken by interrogatories. When the case was tried, the witness being

present, was introduced and examined orally. On a subsequent trial of the same case, the witness then being absent, his depositions were read. The adverse party was allowed to prove, by way of impeachment, that the evidence of the witness, when examined in Court on the first trial, was different from his testimony as it appeared in the interrogatories. The defendant, in whose behalf the interrogatories were read, had testified on the trial *that the witness had stated to him what was substantially the same as was proven by the impeaching witness:*

Held, That the admission of the testimony is no ground for a new trial. *Guerry, Oatis & Co. et al. vs. Brown.* 520

14. On the hearing of a bill filed in a claim case, a consent decree was taken that the land levied on should be sold by the sheriff, and that the attorney for plaintiff in execution should pay out of the proceeds of the sale the cost, and a certain amount to the attorneys of claimants. Other property of the defendant in execution was subsequently sold under other judgments against him. On a motion to distribute the money arising from the last sale, the first mentioned judgment being the oldest, and not being fully paid by the sale of the land, it was competent for the defendant in execution and plaintiffs in the younger judgments to prove by parol that the consent decree and sale under it were to be a satisfaction of the older judgment.

King vs. Greer, ex'r, et al...... 545

15. Where a lot of paper and paper bags was shipped to the plaintiff by railroad, and upon its receipt, it was weighed upon scales not marked, but which were proven to be correct, and the paper was found deficient in quantity, as described in the railroad receipt, it was not error to admit the evidence of the weighing, notwithstanding the failure to procure the marking of the scales. *Southwestern R. R. Co. vs. Cohen*..... 627

16. If illegal evidence be admitted by a Justice and no objection be made at the trial, both parties being represented by counsel, the admission of the evidence is not a good ground for a *certiorari*. *Ibid.*

EXECUTION.

1. Shorter sold land to Rice, against whom there was a judgment, and gave Rice a bond for title. Rice, with-

out paying any of the purchase money, sold to Freeman, agreeing to transfer Shorter's bond, but not having it at the time, gave Freeman his own bond. This was in 1860. Freeman at once paid a portion of the purchase money to Rice and went into possession. A short time afterwards, Freeman paid a sufficient amount to pay Shorter, which was done with the money so advanced, leaving a portion still unpaid to Rice. Freeman subsequently, in 1862, forwarded this to Rice, who, by express, sent his own deed to Freeman. Freeman demanded the bond of Shorter, and Rice replied that he had given him that before. Nothing more was done until 1867, when the judgment creditor levied on the land as Rice's property, and after this levy, Freeman obtained Shorter's deed without warranty :

Held, That no title ever vested in Rice which was the subject of levy and sale. *Akin vs. Freeman*..... 51

2. A defendant in execution, though he may have equities which would entitle him to file a bill for the purpose of setting aside the judgment on which the execution issued, has no right, unless he shows special reasons therefor, to enjoin the levy and sale under the execution, of property which he alleges in his bill belongs to and is in the possession of another person. Such owner of the property may assert his own rights in the premises in such a way as the law provides, and the defendant's right can be determined on the final trial of his bill. *Tompkins vs. Tumlin*..... 460

3. It appearing from the evidence that the execution had been assigned by the original plaintiff, in whose name it was then proceeding, to another, who had since died, there being no written evidence thereof, it was not error in the Court to disallow a motion to suggest the death of the transferee upon the record, and to continue the case until his estate was represented. *Brown vs. Gill*. 549

4. A sheriff having in his hands an execution against B., founded on a debt contracted since 21st of July, 1868, sold property of the defendant for about \$3,000 00. P. having an older judgment, obtained in 1866, for about \$1,000 00 gave the sheriff notice and claimed that much of the money. The sheriff paid to the younger judgment \$2,000 00 of the money, and retained \$1,000 00 in hand to answer the judgment of

P., and P. ruled the sheriff for the amount of his judgment. Pending this rule, the defendant, who had procured this money to be set apart as an exemption by the Ordinary, claimed the money:

- Held*, That it is error in the Court to hold that the defendant was entitled to the money as an exemption as against the *fi. fa.* of P. P. is not estopped from insisting on his right to the \$1,000 00, because he has failed to require the sheriff to bring into Court the whole amount raised at the sale. *Peters vs. Bradford.* 551
5. A rule *nisi* against a sheriff is not demurrable for uncertainty which sets forth at its head the name of the plaintiff and defendant of the *fi. fa.*, the amount of the principal and interest at the date of the judgment, the Court to which the *fi. fa.* is returnable, and which alleges that the sheriff has had the *fi. fa.* long enough to have made the money. *Lee vs. Armstrong*..... 609
6. Two *fi. fas.* may be included in one rule *nisi* against the sheriff, and if one of them be not fully described, a general demurrer does not lie to the rule. *Ibid.*

FACTORS.

1. An agent of a factor is not liable to a third person for failing to transmit his orders to the principal of the agent as to the sale of cotton consigned by such third person to the factor. *Reid vs. Humber*..... 207
2. When a commission merchant and factor advanced money to a planter to purchase supplies, the planter agreeing, in writing, to deliver to the factor, at his own house, in Macon, enough of the crop upon which the money was thus advanced to pay for the said advance, and the planter accordingly did deliver at the depot of the Southwestern Railroad at Montezuma, such cotton, consigned to the factor, at Macon, and after such delivery the cotton was seized to satisfy a lien under the Act of 1866, given to a third person and prior to the factor's advance, but not foreclosed until after the delivery of the cotton at the depot, so consigned to the factor:
- Held*, That the delivery at the depot of the cotton consigned to the factor, was, for the purpose of the lien, a delivery to the factor, and his special property thereupon attached, even against other liens under the Act of 1866, given prior to the factor's advance, if the fac-

tor had no notice of said liens prior to his advance, and there was no foreclosure of the prior lien before the delivery at the depot, as described. *Hardeman & Sparks vs. De Vaughn*..... 596

See *Lien*, 2, 3, 4, 9, 10, 11, 12.

FRAUDS—STATUTE OF.

1. In a parol contract by an agent for the purchase of ninety-two bales of cotton then packed and pointed out, at a stated price per pound, estimating the bales at five hundred pounds each, subject to correction on weighing, it was also verbally agreed that the seller should haul the cotton to a certain place for the buyer; that if it was burned it should be the loss of the buyer; that the agent need not pay the money, but hold it for the buyer to check on as he might want it, and *no act* was done by either party as to the payment or delivery, and the seller afterwards refused to deliver the cotton, and the agent returned the money to his principal:

Held, That this did not make a case of actual receipt by the buyer, or of payment, as required by the 17th section of the statute of frauds, so as to render the seller liable in an action of trover for the cotton. No merely verbal stipulations in the contract, and as part of the contract, are sufficient to take it out of the statute. *Bowers vs. Anderson, adm'r*..... 143

2. Where the terms of a parol contract for the rent of land were, that the tenant should pay a certain portion of the crops for rent, "that he should repair the fences around the cleared land, and the landlord was to pay him for it, that he was to stay on the place one, two, three, four or five years, if both parties were willing, and at all events until he should get pay for the work done on it," and the tenant did repair the fences, and paid the rent, except of the cotton, which he retained, the landlord still owing upwards of \$40 00 after allowing for the rent cotton, for work done in repairs:

Held, There was such a performance of the contract by the tenant, that the landlord could not, on the expiration of the first year, treat him as a tenant at will, so as, on a notice to quit, without payment, or tender of what was due for repairs, to be entitled to a warrant

to dispossess him as a tenant holding over. <i>Petty vs. Kennon</i>	468
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GARNISHMENT.

1. Where L., in the presence of B., deposited a cotton receipt of B. with K. to hold for L. as collateral security for a debt due by B. to L., it is not competent on the trial of a garnishment against K., sued out on an attachment against S., to prove by the sayings of B. that the debt for which the deposit was made as collateral, was an account made by B. with S. Nor was the answer of B. to a summons of garnishment served upon him in the same case, admissible to prove that fact. *Strupper vs. King*..... 328
2. Where the purchaser of the homestead gave his note for a portion of the purchase money, and a judgment creditor of the vendor sued out a garnishment and obtained judgment thereon against the purchaser for the amount of the note, prior to the decision of the Supreme Court of the United States in the case of *Gunn vs. Barry*, and afterward levied the judgment against the vendor on the land, equity will enjoin him from enforcing the judgment obtained on the garnishment for the unpaid portion of the purchase money. *Gunn et al. vs. Thornton*..... 380

HOMESTEAD.

1. On the trial of an appeal from the judgment of the Ordinary allowing two lots of land, by their numbers and district, as a homestead, the proceedings showing the number of acres, and the issue is, whether the homestead set apart by the Ordinary is not in value greater than \$2,000 00 in specie, and, in the evidence, the value is given by the witnesses at certain rates per acre—the jury may find by their verdict in favor of the homestead as allowed by the Ordinary, if they believe, from the testimony, it does not exceed in value the constitutional limit. And if from the evidence they believe it does exceed in value said limit, they may reduce the number of acres, and specify how much and what part of the land shall be allowed as a homestead, so that the same shall not be of greater value than \$2,000 00 on a specie valuation. *Crawford et al., executors, vs. Ward* 40

2. Where a sheriff levies a mortgage execution upon the land of the defendant, but before the sale was notified that the defendant's wife had a homestead set apart in the same, and an appeal had been taken to the Superior Court, the sheriff does not render himself liable to rule by postponing the sale until the plaintiff could obtain an order of Court directing him to sell the land, if it was his duty to do so. *Van Horn vs. Bradford.* 75
3. A judgment for the purchase money of land, where the land has been sold for its satisfaction but does not fully discharge the debt, is not such an incumbrance or lien on the crop made on the premises which was matured and gathered before the levy on the land, as will defeat the right of the family of the vendee to the crop as an exemption, etc., under the homestead law. *Johnson vs. Holmes*..... 365
4. The sale of a homestead in February, 1871, under the 11th section of the Homestead Act of 1868, did not discharge it from the lien of judgments then existing against the owner thereof, which were founded on debts created prior to the time when the present Constitution went into operation. *Gunn et al. vs. Thornton*..... 380
5. Where the purchaser of the homestead gave his note for a portion of the purchase money, and a judgment creditor of the vendor sued out a garnishment and obtained judgment thereon against the purchaser for the amount of the note prior to the decision of the Supreme Court of the United States, in the case of *Gunn vs. Barry*, and afterward levied the judgment against the vendor on the land, equity will enjoin him from enforcing the judgment obtained on the garnishment for the unpaid portion of the purchase money. *Ibid.*
6. The complainant in this case does not show that he had put improvements on the land of such character and to such an extent as will entitle him to an accounting therefor, for reimbursement. *Ibid.*
7. What the rights of the purchaser may be, as to the proceeds of the sale by the sheriff under the judgments against the vendor of property purchased by him with the money that has been paid by such purchaser, we do not now determine, as that question is not properly made in the record for a decision by this Court.

If there be such a sale, he can be heard when the question as to the distribution of the money arises. *Ibid.*

8. A sheriff having in his hands an execution against B., founded on a debt contracted since 21st of July, 1868, sold property of the defendant for about \$3,000 00. P. having an older judgment, obtained in 1866, for about \$1,000 00, gave the sheriff notice and claimed that much of the money. The sheriff paid to the younger judgment \$2,000 00 of the money, and retained \$1,000 00 in hand to answer the judgment of P., and P. ruled the sheriff for the amount of his judgment. Pending this rule, the defendant, who had procured this money to be set apart as an exemption by the Ordinary, claimed the money:

Held, That it was error in the Court to hold that the defendant was entitled to the money as an exemption as against the *fi. fa.* of P. P. is not estopped from insisting on his right to the \$1,000 00, because he has failed to require the sheriff to bring into Court the whole amount raised at the sale. *Peters vs. Bradford.* 551

9. Where, in March, 1872, a homestead in the realty and personalty of the husband was set apart to the wife, and a levy of an execution immediately afterwards made on the balance of the land, and the husband died in April, 1872, pending the levy, the wife is not entitled to twelve months' support out of the proceeds of the sale of such balance. If there be special grounds set up by the wife, such as that the homestead exemption is not of the value of the twelve months' assignment, she should show that fact. *Singleton, et al., vs. Huff*..... 582

10. Where H. is indebted to S., and to secure him for the debt due, and for a further advance of money made by him to H., H. and his wife, with the approval of the Ordinary, convey the homestead which had been set apart for the benefit of the family of H. to the creditor, and he, at the same time, takes the notes of the husband for the debt, and executes a bond to make titles to him for the same land, upon the payment of the notes:

Held, That the whole transaction constitutes nothing more than a mortgage, and the rights of the beneficiaries of the homestead arising out of these facts can be set up by the husband in an action against him by the creditor to recover the land. *Shaffer vs. Huff.* 589

11. The fact that the creditor and the husband, on the maturity of the notes, agree between themselves, without the consent or approval of the wife or the Ordinary, to cancel the bond and the notes, does not deprive the wife and children of their rights under the agreement. *Ibid.*

HUSBAND AND WIFE.

1. An infant married woman may maintain an action for a divorce. *Besore vs. Besore* 378
2. Suit was brought against the maker and indorser of a promissory note, dated August 29th, 1866. The maker pleaded that the payee and indorser of the note was his wife at the time the note was executed, and had no separate estate. The indorser specially pleaded the same. The suit was discontinued as to the indorser. On demurrer, the plea of the maker was stricken by the Court :
Held, That this was not error, and that the husband was liable to the plaintiff, either as bearer, if the wife was not legally competent to make the indorsement, or as indorsee, if she was ; and any defect as to the character in which he sued was amendable, and is cured by the verdict. And the more especially is the husband liable in this case, as the plea does not charge, nor was it offered to be proved, that the plaintiff had knowledge that the payee and indorser was a married woman, and it appears that he was the holder of the note before its maturity. *Leitner vs. Miller* 486
3. Suit was brought against the maker and indorser of a promissory note, dated March, 1866. The maker filed a plea that she was a married woman when the note was executed and had no separate estate. The indorser pleaded the same, alleging that the maker was his wife, and that he was an accommodation indorser. The Court, on demurrer, struck the plea of the indorser. Neither plea alleged notice to plaintiff, who obtained the note before maturity from a prior indorser. No evidence was introduced or tendered to prove the facts alleged in the maker's plea, and there was a verdict against both defendants :
Held, There was no error. *Leitner et al. vs. Miller* 489
4. Where H. is indebted to S., and to secure him for the debt due, and for a further advance of money made by

him to H., H. and his wife, with the approval of the Ordinary, convey the homestead which had been set apart for the benefit of the family of H. to the creditor, and he, at the same time, takes the notes of the husband for the debt, and executes a bond to make titles to him for the same land, upon the payment of the notes :

Held, That the whole transaction constitutes nothing more than a mortgage, and the rights of the beneficiaries of the homestead arising out of these facts can be set up by the husband in an action against him by the creditor to recover the land. *Shaffer vs. Huff*. 589

5. The fact that the creditor and the husband, on the maturity of the notes, agree between themselves, without the consent or approval of the wife or the Ordinary, to cancel the bond and the notes, does not deprive the wife and children of their rights under the agreement. *Ibid*.

See *Divorce*.

ILLEGALITY.

1. A defendant in execution who lodged with the levying sheriff, on the 15th of September, 1871, an affidavit that the legal taxes on the debt had not been paid, which affidavit was made for the purpose of arresting the sale, and did arrest the sale, and was prosecuted by the defendant to a trial as affidavits of illegality are tried, was liable, on the trial thereof, to the penalties provided by law for the filing of affidavits of illegality for delay only, provided the jury believed it was interposed for that purpose. *White et al. vs. Hasslett et al*..... 280
2. On the trial of such case, the only legal issue which, under any valid law, could have been before the jury, was whether such affidavit was filed for delay only ; and plaintiffs having attached to the execution an affidavit of the payment of taxes before the defendant filed his affidavit and proved the same on the trial, and the defendant offered no evidence, " We, the jury, find for the plaintiffs ten per cent. damages," was a legal verdict, and one that covered the whole issue. *Ibid*.
3. An affidavit of illegality to an execution having been filed on the ground of want of service, it was incum-

- bent on the defendant to have produced the record of the suit and to have supported the allegations in his affidavit by evidence, the presumption of the law being in favor of the validity of the judgment. *Brown vs. Gill*..... 549
4. It appearing from the evidence that the execution had been assigned by the original plaintiff, in whose name it was then proceeding, to another, who had since died, there being no written evidence thereof, it was not error in the Court to disallow a motion to suggest the death of the transferee upon the record, and to continue the case until his estate was represented. *Ibid.*
5. Grounds other than those taken in the affidavit of illegality, cannot be insisted on at the hearing. *Ibid.*
6. An affidavit of illegality to an execution from Whitfield Superior Court, in which the defendant alleged that he was never served with any process and copy of the declaration in the suit upon which said judgment was rendered; that he was, at the time said action was commenced and up to the date of the judgment, a resident of the county of Randolph and not of the county of Whitfield, was properly dismissed on demurrer, as it failed to disclose that he had not acknowledged service of the declaration and process, and that he had not appeared and pleaded to the merits. *Cobb vs. Pitman*..... 578
7. Where an affidavit of illegality was filed to a mortgage execution on the ground that it had been paid, it was error to allow, upon the trial of the issue thus formed, a motion to be made to dismiss the levy and the execution on the ground that the mortgage was upon the growing crop, and, therefore, void. *Monroe, Jr., vs. Castleberry*..... 630

IMPEACHMENT OF WITNESS.

See *Witness*, 1, 5.

INDORSEMENT.

1. Suit was brought against the maker and indorser of a promissory note, dated August 29th, 1866. The maker pleaded that the payee and indorser of the note was his wife at the time the note was executed, and had no separate estate. The indorser specially pleaded the same. The suit was discontinued as to the indor-

ser. On demurrer, the plea of the maker was stricken by the Court:

Held, That this was not error, and that the husband was liable to the plaintiff, either as bearer, if the wife was not legally competent to make the indorsement, or as indorsee, if she was; and any defect as to the character in which he sued was amendable, and is cured by the verdict. And the more especially is the husband liable in this case, as the plea does not charge, nor was it offered to be proved, that the plaintiff had knowledge that the payee and indorser was a married woman, and it appears that he was the holder of the note before its maturity. *Leitner vs. Miller*..... 486

2. Although plaintiff's name may be on the back of the note sued on, he may recover against the maker, as the law will presume, in the absence of proof to the contrary, that an indorsement by him was never completed by delivery, or if he had delivered it so indorsed, that he had again taken it up, and was again the legal holder or indorsee. *Ibid*.

3. Suit was brought against the maker and indorser of a promissory note dated March, 1866. The maker filed a plea that she was a married woman when the note was executed, and had no separate estate. The indorser pleaded the same, alleging that the maker was his wife, and that he was an accommodation indorser. The Court, on demurrer, struck the plea of the indorser. Neither plea alleged notice to plaintiff, who obtained the note before maturity from a prior indorser. No evidence was introduced or tendered to prove the facts alleged in the maker's plea, and there was a verdict against both defendants:

Held, There was no error. *Leitner et al. vs. Miller*..... 489

INFANT. See *Husband and wife*, 1.

INJUNCTION.

1. Land was sold at auction by S.; C. gave notice at the sale of a claim of title; S. replied that he would warrant the title, and would give to the purchaser a bond, with ample security, to indemnify him against the loss of any sum that might be expended in improvements upon said property. Complainant purchased for \$1,010 00, and paid one-fourth of the purchase money

in cash, and gave his three notes for the remaining three-fourths, taking the usual bond for titles from S. Two of these notes were paid at maturity. The remaining one was dishonored, because C. had commenced suit for the land. In the meantime, complainant had placed improvements thereon to the value of \$400 00. S. obtained judgment for the amount of the last note, has filed a deed to the land in the clerk's office, and has levied the execution upon the same. The Chancellor did not commit error in enjoining the sale, the injunction to be dissolved upon bond and security being filed by S. in the sum of \$1,000 00, conditioned to indemnify complainant against loss on his improvements in case of the failure of his title. *Seago et al. vs. Bass*..... 9

2. When the agents of two sewing machine companies were competitors before the Georgia State Agricultural Society for the premium for the best machine, the successful party who secures the premium is not entitled to an injunction to restrain the other from publishing in a newspaper that he, and not the other, received the premium. Courts of equity will not restrain the publication of a libel, nor use the writ of injunction to prevent parties from publishing untruths respecting their wares when there is no infringement of a property right. *Singer Man. Co. vs. Dom. S. M. Co. et al.* 70
3. When A filed a bill in equity against C's administrator, alleging that he (A) and B had, during the late war, traded lands; that B was at the time indebted to C for a part of the purchase money of the land, but C was refusing Confederate money, so that the debt could not be paid; that for this reason A only gave to B his bond for titles to the land he let them have; that B afterwards traded the land he got of complainant to D and transferred the bond; that shortly after this complainant received a message from C, then in life, that he might safely make a deed to D, as he (C) was now willing to take Confederate money from B for his debt; that knowing positively that B had the money and was ready to pay, he (A,) in consequence of this message, made titles to D and took up his bond; that he is informed that B soon after tendered the Confederate money to C, who refused it; that C had died, and his administrator, the defendant, was proceeding to levy his judgment, which was a judgment on the fore-

closure of a mortgage on the land. The bill prayed a perpetual injunction against the mortgage, and a temporary injunction until the trial. The Court granted the temporary injunction. C's administrator, the defendant, answered the bill, denying, on his information and belief, the sending of the message and the tender of Confederate money, and moved to dissolve the injunction and to dismiss the bill for want of equity. The Court dissolved the injunction and dismissed the bill.

Held, That as the statements of the bill, on which its equity depends, were not stated as in the complainant's own knowledge, and was not supported by any affidavits of their truth, the Court did not err in dissolving the injunction. *Lee vs. Clark, ex'r*..... 81

4. Where a plaintiff sues for the balance due on notes for the purchase money of land, and the jury, under the Relief Act of 1868, render a verdict returning the land to the plaintiff, requiring him to pay to the defendants \$3,553 27, upon which a judgment was duly entered, and the defendants having obtained a *supersedeas*, carried the case to the Supreme Court, but withdrew the writ of error on the calling of the case in that tribunal :

Held, That on a bill filed by the plaintiff stating the aforesaid facts, and that the defendants had remained in possession since the rendition of said judgment, receiving large rents and profits ; that the plaintiff had been compelled to pay a large amount as taxes upon the property to prevent its sale ; that the defendants had procured an execution to be issued on said judgment and levied on said land ; that plaintiff was ready to pay the amount required by said judgment, after deducting the rents and profits, and taxes expended as aforesaid, it was not error in the Chancellor to enjoin said execution, and to appoint a receiver to take charge of said land until the final hearing of the case. *Collier et al. vs. Sapp, adm'r*..... 93

5. In this case, we think, under the answers and the incontestible facts of the case, the Chancellor erred in enjoining the executions. They, and the connection of the defendants with them, had nothing whatever to do with the controversy growing out of the transaction in September, 1871. The defendants had a perfect right to buy them, and so far as appears by anything in these

proceedings, they have a right to collect them. *Spence et al. vs. Steadman*..... 133

6. It is a well settled rule of law that parties may, if they please, *really* and *truly* sell property for a consideration actually passing, and at the same time secure the right to repurchase it at a future time for an agreed price, and if this be really the intent of the parties, the law will enforce it. It is also true that the difference between such a transaction and a mortgage is often a very nice one, and that the Courts will scrutinize the matter very closely to discover whether there was, in fact, anything more intended than to provide a security for money due or advanced at the time, and all the facts will be looked to in search of the truth of the case. The great cardinal rule for testing the intent seems to be whether or not the relation of debtor and creditor was intended to exist between the parties—whether the property was taken in *satisfaction and discharge* of the sum due or advanced; or whether, notwithstanding the words of the conveyance, the relation of debtor and creditor was still to exist, to-wit: the right of the one to demand, and the obligation of the other to pay. Under this rule, we think, from the bill and answers, that the transaction begun in June, 1871, by the complainant's offer, and accepted and acted on by both in September, 1871, as evidenced by the complainant's proposal, the defendants' acceptance, and the deed, lease, bond and payments, furnish, so far as appears from the face of the papers, or from any facts appearing at the hearing, taking the answers of the defendants as evidence, was a contract of sale, lease and agreement to permit the complainant to rebuy, and not a loan of money, and scheme to evade the usury laws; at least, that under the uncontradicted answers of the defendants, it was error in the Judge to have considered the charges of the bill so far made out as to justify the injunction on that ground. What may be the truth of the case, as it may be made out at the trial before a jury, is not now the question. *Ibid.*
7. As it is admitted on all hands that the \$10,000 00 to be advanced for machinery has never, in fact, been advanced, and as it is perfectly apparent that this \$10,000 00 was in the minds of the parties in fixing the amount to be paid on the repurchase, and as from the bill, answers and papers before the Court, there is

strong reason to believe that the rent was fixed at ten thousand dollars, instead of eight thousand dollars, in view of the expectation of all parties that this advance would be made and the complainant get the benefit of it under his lease, and as it is admitted that the complainant has paid the \$8,000 00 for the rent of 1872, according to his construction of the amount really intended by the contract, we are of opinion that the facts, as they appear in the bill and answers, and by the proposition, lease and bond, justify the Court in considering the complainant to have made out such a *prima facie* case of compliance with the real intent of the lease as to authorize an injunction against his eviction for his failure to pay the \$10,000 00, instead of \$8,000 00, for the rent of 1872, and that the injunction against his eviction should be continued until the 1st of January, 1874, provided he keep the property insured, as agreed upon, and promptly pay \$8,000 00 rent for 1873, in quarterly payments, on the 1st of April, July and October, and the 31st of December, 1873, with the right to rebuy at the end of 1873, as provided in the bond, leaving the real truth of the amount of the rent for 1872 and 1873, as well as whether the transaction of September, 1871, was a mortgage or sale—the question of usury, and the other questions made, to be finally settled by the jury on the trial. *Ibid.*

8. Whether the complainant has performed the condition annexed to its grant so as to entitle it to the enjoyment of the exclusive franchise claimed, the evidence is conflicting; an injunction, therefore, should not be granted until the final hearing. *Savannah, S. & S. R. R. Co. vs. Coast Line R. R. Co.* 202
9. A legatee or the purchaser of a distributive share in an estate may, in equity, set off the same against a judgment in favor of the executor against such legatee or owner of such share, where no special reason exists for the collection of the judgment by the executor. *Dorsey vs. Simmons et al.* 245
10. One of the shares in the estate proposed to be set off or allowed against the judgments, belongs to complainant by survivorship, and she is not affected by a previous bill filed by her husband (now deceased) for the same purpose as this, and dismissed by him. And though the judgments sought to be enjoined were ob-

- tained against her husband, yet as they are levied on property belonging to complainant and would, if collected, be assets to which her legacy would attach, she has not lost her right to be heard. *Ibid.*
11. The facts shown at the hearing for an injunction, entitle complainant to have the collection of the judgments stayed until her rights can be determined at the final trial. *Ibid.*
 12. The jury cannot, by their verdict, enjoin the complainant, where no cross-bill has been filed by the defendant containing a prayer therefor. *Renew vs. Darley et al.*..... 332
 13. Where the purchaser of the homestead gave his note for a portion of the purchase money, and a judgment creditor of the vendor sued out a garnishment and obtained judgment thereon against the purchaser for the amount of the note prior to the decision of the Supreme Court of the United States, in the case of *Gunn vs. Barry*, and afterward levied the judgment against the vendor on the land, equity will enjoin him from enforcing the judgment obtained on the garnishment for the unpaid portion of the purchase money. *Gunn et al. vs. Thornton*..... 380
 14. A State Court will not grant an injunction restraining a party from applying for the benefit of the Bankrupt Act under the bankrupt law of the United States. *Fillingim vs. Thornton*..... 384
 15. A defendant in execution, though he may have equities which would entitle him to file a bill for the purpose of setting aside the judgment on which the execution issued, has no right, unless he shows special reasons therefor, to enjoin the levy and sale, under the execution, of property which he alleges in his bill belongs to and is in the possession of another person. Such owner of the property may assert his own rights in the premises in such a way as the law provides, and the defendant's right can be determined on the final trial of his bill. *Tompkins vs. Tumlin et al.*..... 460
 16. Courts of equity will not interfere with the regular course of an administration, by appointing a receiver to take the assets of the estate out of the hands of the administrator, unless the danger be imminent, and the charges in the bill be positive and specific. *Powell vs. Quinn et al.*..... 523

17. The process of injunction ought not to be used to restrain one from selling property to which he has apparent title, except upon positive charges and strong grounds to believe such restraint necessary to prevent wrong. *Ibid.*
18. Land was devised to the wife for life, and at her death to be equally divided between two daughters, L. and E. Judgments were obtained against the representative of the estate on debts due by the testator. After the rendition of the judgments and death of the tenant for life, the land was equally divided between the daughters, L. and E. Subsequent to this L. mortgaged the portion she received to C. Plaintiffs in the judgments caused their executions to be levied on the share received by E. The executions not being satisfied from the proceeds of this levy, they were levied on the land of L. C., the mortgagee, filed a bill to enjoin the sale under this levy, on the ground, amongst others, that plaintiffs made an agreement with E, or those holding under her, whereby they remitted all claims on her land for \$1,000 00, when the same was worth nearly four times that sum, and that thereby the whole of the balance of the executions, amounting to about \$6,000 00, is sought to be enforced against the land of L., on which he holds the mortgage:
- Held*, That the right of contribution existed between L. and E. as to the payment of the executions, and if the creditors discharged all claims on the land of E, for less than the proportionate share of her liability to contribute to L., C., as the creditor of L., by mortgage, which has been foreclosed, is entitled to assert her rights, as well as his own equities arising out of such facts, against such creditors. *Compton & Sons vs. Pitman et al.*..... 612
19. The evidence at the hearing for an injunction, shows no equity arising out of the question as to part of the land received by L. being turned over to her by the tenant for life (who was the executrix) before the judgments were obtained, nor do the facts shown in the matter of the release by the creditors to L. of certain lands of her deceased husband's estate, although he was a co-defendant in some of the judgments, authorize the injunction to be enlarged, as her claim for dower and twelve months' maintenance, both of which had been assigned and set apart, would exhaust the same. *Ibid.*

20. This being a judgment refusing to grant an injunction on a bill, answer and affidavits, we are not satisfied that there was any abuse of the discretion of the Court, and there being no error of law, the judgment is affirmed. *Parker vs. Green et al.*..... 624

INSURANCE.

Where a bill was filed against an insurance company to make them liable for certain cotton lost by the sinking of a steamboat, on the ground that their agent had fraudulently misled the owners, so as to induce them to believe that the cotton was insured by the company; and the evidence showed that the agent, for whose act the company was sought to be charged, was the agent of several other insurance companies engaged in the same business at the same place, and there was nothing in the proof to show for which of the companies the agent was acting at the time he did the acts from which the fraud was sought to be inferred:

Held, That a verdict against the company was illegal, and without evidence to support it, and it was error in the Court to refuse a new trial. *Underwriters' Agency vs. Seabrook, adm'r.*..... 563

INTEREST.

1. Interest on an unpaid salary of an officer cannot be enforced against the county out of which the same is to be collected. *Holtscaw vs. Russ, Ordinary; Giles vs. Same* 115
2. Where an action is brought against warehousemen for the value of two bales of cotton entrusted to them, which they had failed to deliver on demand, it was not error in the Court to charge that the plaintiff was entitled to interest on the value of the cotton from the day of the demand as a part of his damages, and to refuse to charge that the jury might allow or withhold interest in their discretion. *Garrard, ex'r, vs. Dawson.* 434

INTERROGATORIES.

1. When answers to interrogatories were taken, by consent, without a commission, the execution and return of the interrogatories were not controlled by the provisions of the statute regulating the issuing and return of commissions. *Shorter vs. Marshall.*..... 31

2. The interrogatory, "Please state whether or not you have, from year to year, given in and paid all legal taxes chargeable by law on the debt which is the foundation of this suit?" is not so leading, under the previous rulings of this Court, as to be excluded on exception taken *Ibid.*
3. When a number of questions are asked in a single cross-interrogatory, this Court will not scan the answers as closely as if each was a separate interrogatory. If the whole answer taken together, is a substantial reply to the whole interrogatory, it will be held to be sufficiently full, though each question is not separately answered. *Ibid.*

JOINT AND SEVERAL LIABILITY.

1. Where a plaintiff, in 1869, sued two joint and several makers of a promissory note, executed in 1863, due one day after date thereof, and after the 1st day of January, 1870, dismissed the action against one of the defendants and obtained a judgment against the other, there being no plea filed by the latter, such dismissal was not a discharge of the defendant against whom the judgment was rendered. If the party against whom the judgment was obtained was a surety and the other was principal, the rule would be different. *McCarter vs. Turner et al.*..... 309
2. On the hearing of a bill filed by such defendant, praying an injunction against the judgment and execution issued thereon, and one of the issues being whether the defendant, against whom the judgment was obtained, was the security of the party who was dismissed from the suit, the note not showing that fact, parol testimony is admissible to show what was the understanding and agreement of the parties to the note on that point, at the time of its execution. *Ibid.*

JUDGMENT.

1. The eighth and twenty-ninth sections of the Act of 1856, prescribing that after seven years without an entry, etc., a judgment shall not be enforced, but shall be presumed to be satisfied, and also that where a *bona fide* purchaser has been in the possession of real property four years, it shall be discharged of the lien of any judgment against the person from whom he pur-

chased, were parts of a statute of limitation in force on the 30th of November, 1860, and were, by the terms, spirit and intention of the Act of that date suspended; and by the various Acts from 1860 to 1865, the suspension was continued until the close of the war.

Akin vs. Freeman..... 51

2. Shorter sold land to Rice, against whom there was a judgment, and gave Rice a bond for title. Rice, without paying any of the purchase money, sold to Freeman, agreeing to transfer Shorter's bond, but not having it at the time, gave Freeman his own bond. This was in 1860. Freeman at once paid a portion of the purchase money to Rice and went into possession. A short time afterwards, Freeman paid a sufficient amount to pay Shorter, which was done with the money so advanced, leaving a portion still unpaid to Rice. Freeman, subsequently, in 1862, forwarded this to Rice, who, by express, sent his own deed to Freeman. Freeman demanded the bond of Shorter, and Rice replied that he had given him that before. Nothing more was done until 1867, when the judgment creditor levied on the land as Rice's property, and after this levy, Freeman obtained Shorter's deed without warranty:

Held, That no title ever vested in Rice which was the subject of levy and sale. *Ibid*.

3. Where, for a valuable consideration, the defendant covenanted to pay to the plaintiff whatever amount he might recover in a suit then pending against R., on a note dated in March, 1862, and due twelve months after date, for \$3,500 00, besides interest, and at the September term of the Court, 1866, a judgment was rendered in said suit for \$1,990 34 with interest and costs, and at the March term, 1871, under the provisions of the Relief Act of 1868, said judgment was reduced by the verdict of a jury to the sum of \$700 00, upon which last verdict no judgment appears to have been entered, it was error in the Court to direct the jury to find for the plaintiff the amount last aforesaid.
Simmons vs. Shaffer..... 242
4. The legal presumption, from the absence of a judgment on the second verdict, is that it was arrested, or a new trial granted or some other valid legal reason existed why none was rendered. *Ibid*.
5. The sale of a homestead in February, 1871, under

- the 11th section of the Homestead Act of 1868, did not discharge it from the lien of judgments then existing against the owner thereof, which were founded on debts created prior to the time when the present Constitution went into operation. *Gunn et al. vs. Thornton.* 380
6. The judgment of a Court of concurrent jurisdiction, *directly upon the point*, is, as a plea, a bar, or as evidence, conclusive between the same parties, upon the same matter, directly in question in another Court. The judgment of a Court of exclusive jurisdiction, directly upon the point, is in like manner conclusive upon the same matter, between the same parties, coming incidentally in question in another Court for a different purpose. *Bradley vs. Johnson, adm'r*..... 412
7. The complainant having *caveated* the application of the defendant for administration upon the estate of his intestate upon the ground that she was entitled to such administration, as his widow, and the jury in the Superior Court having, on appeal, found a verdict on this issue in favor of the defendant, and a judgment having been rendered accordingly, such judgment is not a bar to a bill filed by the complainant as the widow and heir-at-law of said intestate, against the defendant for an account and distribution of the estate. *Ibid.*
8. Estoppels must be mutual. *Ibid.*
9. On the hearing of a bill filed in a claim case, a consent decree was taken that the land levied on should be sold by the sheriff, and that the attorney for plaintiff in execution should pay out of the proceeds of the sale the cost, and a certain amount to the attorneys of claimants. Other property of the defendant in execution was subsequently sold under other judgments against him. On a motion to distribute the money arising from the last sale, the first mentioned judgment being the oldest, and not being fully paid by the sale of the land, it was competent for the defendant in execution and plaintiffs in the younger judgments to prove by parol that the consent decree and sale under it were to be a satisfaction of the older judgment. *King vs. Greer, ex'r, et al.*..... 545
10. An entry by a sheriff on an execution as follows: "Received this *fi. fa.* of L. T. Downing for collection, August 15, 1869," signed by the sheriff, is a sufficient "entry" by an officer authorized to execute and

return the *fi. fa.* to prevent the dormancy of the judgment. *Hatcher, ex'x, vs. Gammell & Co*..... 576

JUDICIAL SALE.

1. A bill was filed by a purchaser at a sheriff's sale, under a common law *fi. fa.*, against a former purchaser of the same land at a sale by virtue of a tax *fi. fa.*, to set aside and cancel the deed made to such former purchaser. The issue thus made, and the finding thereon by the jury in favor of complainants, did not authorize the Chancellor to decree the cancellation of the deeds both of defendants and complainants, and to direct that the land be resold under the common law *fi. fa.* If the defendant in execution, or his creditors, had any equities in the premises requiring a resale, they should have been parties to the proceedings, which could have been done on their own motion. *Burke et al. vs. Wilkins et al.*..... 257
2. Where, after the levy of a mortgage *fi. fa.*, the property subject thereto was, by consent of the mortgagor and mortgagee, sold by auctioneers, and the proceeds paid into Court for distribution, the assignee of the mortgagor, proceedings in bankruptcy having been, previous to said sale commenced against him, was entitled to the fund. If the money in controversy had been raised by a judicial sale of the property of the bankrupt by the sheriff, on final process, in the enforcement of a lien of prior date to the commencement of the proceedings in bankruptcy, there would have been no impropriety in the appropriation of the same to the satisfaction of the mortgage lien. *Morris vs. Davidson, assignee*..... 361
3. After it is shown to the Court that the defendant had been declared a bankrupt, judicial notice will be taken of the fact that all his property and effects were vested by operation of law in his assignee. *Ibid.*
4. It was error in the Court to charge "that upon the failure of the purchaser at sheriff's sale to comply with the terms of the sale, the sheriff might lawfully put up and sell the property at a subsequent sale day, without readvertising the property, and that, in the meantime, he had the right to sell and convey the property to any person who would come forward and take the bid off the delinquent bidder's hands, and pay the

money, particularly if it was acquiesced in by the delinquent bidder." *Williams vs. Barlow*..... 530

5. Where property was advertised for December sales, but was not sold until the first Tuesday in January, and then without any new advertisement, and the purchaser failed to comply with the terms of the sale, but some days afterwards transferred his bid to another who did comply, receiving a conveyance from the sheriff:

Held, That he acquired no title. *Ibid*.

JURISDICTION.

See *United States Courts*, 3.

" *Venue*, 1, 2, 3, 4.

JURY.

1. Where, on a motion for new trial, one of the grounds insisted on was, that one of the jury who tried the cause was asleep during a portion of the trial, and no affidavits were filed with the motion, but it was proposed to show by parol, at the hearing, that such was the fact, and the Court refused to hear the witnesses, and refused also the new trial:

Held, That the proof ought to be made as a part of the motion, in writing, by affidavits attached, and that a new trial ought not, in any event, to be granted on such a ground unless it affirmatively appeared that the prisoner and his counsel did not know the jurymen was asleep before the jury retired to find a verdict. *Cogswell vs. The State*..... 103

2. An indictment found by a grand jury, constituted by filling up the places of the drawn grand jurors who failed to appear, by tales jurors, as provided by the Act of 1869, is valid. *Malone vs. The State*..... 210
3. A challenge to the array of jurors put upon defendant, on the ground that the various panels have been drawn from a box containing the names of only one thousand persons, whereas the number of persons in the county subject to jury duty, from whom he has a right to select, amount to four thousand, was properly overruled, where no proof was offered in support thereof. *Ibid*.
4. The verdict should be read to the jury before they are polled. *Ibid*.

5. If the bailiff who attended the jury, ate and slept in the same room with them, it was incumbent on the defendant to have shown it by competent evidence. *Ibid.*
6. Where, upon the trial of a case arising under the forcible entry and detainer law, the jury reported to the presiding Justice that they could not agree upon a verdict, and the magistrate told them that they must agree or he would take them with him to Blakely, and the jury subsequently returned a verdict for the defendant, but upon being polled, two of them stated that they had consented to the verdict, but had not agreed to it, and the Justice received the verdict over the objection of the plaintiffs:
Held, That the proceeding was illegal. *Powell et al. vs. Lawson*..... 290
7. Where a case was submitted to the jury upon the agreement of counsel, that should they make a verdict before the Court convened on the next morning, the foreman might take the papers and the jury disperse; which course was pursued, but upon the assembling of the jury on the succeeding day, the foreman stated to the Court that, on the previous evening, the jury had agreed upon a verdict, but that he, after they had dispersed, had become satisfied that there was an error in it, and asked that the jury be remanded to their room that the error might be corrected, it was error in the Court, after asking them in a body if any one had tampered with them or attempted to influence their opinions in any way in the matter, to which none of them made any reply, except that two of them stated that the sheriff and another person had asked them if they had agreed upon a verdict, to accede to the request of the foreman. *Cothran, adm'r, et al., vs. Donaldson*..... 458
8. If the verdict was merely imperfect and informal, but the intention of the jury was clearly expressed, then the Court should have had the verdict put in proper form in accordance with that intention. If, however, the verdict was so defective as to be void, under the law, then the Court should have set it aside and declared a mistrial. *Ibid.*
9. The affidavits of jurors are not admissible to impeach their verdict. *King et al. vs. King et al.*..... 622

LANDLORD AND TENANT.

1. Where the landlord occupied a room in the same building, immediately over the store of the tenant, he is presumed to have known the condition of the roof better than the tenant, and notice by the tenant to the landlord to repair such roof is unnecessary to entitle the tenant to recoup the damages sustained by leakage as against a distress warrant for rent. *Guthman vs. Castleberry*..... 272
2. The landlord is not liable to the tenant for damages to his goods resulting from unforeseen and extraordinary causes, unless so stipulated in the contract at the time of renting. *Ibid.*
3. Where the terms of a parol contract for the rent of land were, that the tenant should pay a certain portion of the crops for rent, "that he should repair the fences around the cleared land, and the landlord was to pay him for it, that he was to stay on the place one, two, three, four or five years, if both parties were willing, and at all events until he should get pay for the work done on it," and the tenant did repair the fences, and paid the rent, except of the cotton, which he retained, the landlord still owing upwards of \$40 00 after allowing for the rent cotton, for work done in repairs:
Held, There was such a performance of the contract by the tenant, that the landlord could not, on the expiration of the first year, treat him as a tenant at will, so as, on a notice to quit, without payment or tender of what was due for repairs, to be entitled to a warrant to dispossess him as a tenant holding over. *Petty vs. Kennon* 468

LAWS.

1. WARNER, Chief Justice. Where the widow brings suit in this State for damages resulting from the killing of her husband in the State of Alabama, through the negligence of a railroad company, the Court will be governed by the laws of this State as to the mode of procedure in ascertaining the rights of the parties, but as to what are their rights, must be determined by the laws of Alabama, where the act complained of was done. *Selma, Rome and Dalton R. R. Co. vs. Lacey*. 106
2. In a suit by a widow, in this State, against a railroad company for the killing of her husband in the State of

Alabama, the declaration cannot be amended after the lapse of one year from the alleged killing, for the reason that the statute law of Alabama limits the right to recover damages therefor to one year from the time of the death, and gives the right of action to the personal representative of the deceased. *Ibid.*

3. McCAY and TRIPPE, Judges. Where, by the law of Alabama, the personal representative of a party who is killed by the wrongful act or negligence of another, is entitled to an action for damages therefor, no other person but such personal representative can bring such action in the Courts of this State, when the killing occurred within the State of Alabama. The widow of the party killed cannot, in her own name as such widow, maintain such action. *Ibid.*
4. The laws which exist at the time and place of the making of a contract, enter into and form a part of it. *West End and Atlanta Street R. R. Co. vs. Atlanta Street R. R. Co.*..... 151
5. An affirmative statute is a repeal by implication of a precedent affirmative statute, so far as it is contrary thereto. *Ibid.*
6. Where there are two affirmative statutes, and the substance of each is such that both may stand, the latter statute does not repeal the former, but both have a concurrent efficacy. *Patillo vs. The State*..... 172
7. Section 1585 of Irwin's Revised Code, requiring persons who shall sell by weights and measures to have their weights and measures marked as correct by the clerk of the Inferior Court, (now the Ordinary,) and in default of such marking, providing that such persons shall not collect any account, note or other writing, the consideration of which is any commodity sold by their weights and measures, is an Act fixing a penalty, and is not to be extended beyond its terms. *South-western R. R. Co. vs. Cohen*..... 627

LEAVE OF ABSENCE. See *Attorney*, 2, 3.

LEGACY. See *Wills*, 1.

LEVY AND SALE.

See *Execution*, 1, 2.

" *Judicial Sale*, 4, 5.

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LIBEL.

1. Where the agents of two sewing machine companies were competitors before the Georgia State Agricultural Society for the premium for the best machine, the successful party who secures the premium is not entitled to an injunction to restrain the other from publishing in a newspaper that he, and not the other, received the premium. Courts of equity will not restrain the publication of a libel, nor use the writ of injunction to prevent parties from publishing untruths respecting their wares when there is no infringement of a property right. *Singer Man. Co. vs. Dom. S. M. Co. et al.* 70
2. When, in an action for damages for the publication of a libel, the defendant pleaded justification :
Held, That, under the law of this State, (Code of 1873, section 3051,) this admitted not only the publication, but the manner of it, as charged in the declaration.
Ransone vs. Christian..... 491
3. Whilst this Court will be slow to interfere with the verdict of a jury in a libel case, on the ground that the damages are excessive, yet, in such cases, it will look closely into the rulings of the Court, and if there be errors which may have influenced the jury in the amount of their verdict, a new trial will be granted. *Ibid.*
4. It is only in actions of *tort*, and where there are circumstances of aggravation, that a jury is authorized to give punitive damages, and whether such circumstances do, in fact, exist, is a question for the jury, and not for the Court, to decide. *Ibid.*
5. If, in an action for a libel, the defendant pleaded justification, and failed to make out his plea, the plea itself is a circumstance which the jury may, in fixing the amount of damages, consider as aggravating the *tort*, but the jury is not bound, in all cases, so to consider it ; on the contrary, if the defendant show strong grounds in support of the charge he has made, though he does not fully support his plea, the jury may, if it sees fit, consider these grounds as mitigating circumstances, and reduce the damages accordingly. *Ibid.*
6. It is error in the Court to exclude circumstances going to show that the plea of justification is true, as when a defendant undertook to show that the plaintiff was guilty of perjury in swearing that the contents of a

certain bond represented the truth of a certain contract between himself and another, and the Court ruled out certain acts and sayings of the plaintiff, inconsistent with the provisions of the bond, as they appeared on its face. *Ibid.*

7. In this State, as provided by section 3261, Code of 1873, the defendant, in an action *ex delicto*, may plead, as a defense, any claim he may have against the plaintiff, which arises *ex delicto*. *Ibid.*

LIEN.

1. A sale of land by an administrator *cum testamento annexo*, made under an order of the Court of Ordinary, to pay the debts of the testator, where the estate is insolvent, discharges the land of the lien of the vendor for the unpaid purchase money, and the creditor must look to the proceeds in the hands of the representative of the estate. *Stallings, ex'r, vs. Ivey, adm'r, et. al.*..... 274
2. An affidavit made to foreclose a merchant's lien, under the 1977th section of the Code, must state that the deponent is either a factor or a merchant, and that, as such, he has furnished either provisions or commercial manures, or both, to the defendant, and also the terms upon which said supplies were furnished. *Toole & Shemphert vs. Jowers*..... 299
3. Proceedings to foreclose the lien must be commenced within one year after the debt becomes due. *Ibid.*
4. The fact that the defendant had replevied the property by giving bond and security, did not deprive him of the right to move to dismiss the proceedings, he having alleged in his counter-affidavit that they were void under the law. *Ibid.*
5. A judgment for the purchase money of land, where the land has been sold for its satisfaction but does not fully discharge the debt, is not such an incumbrance or lien on the crop made on the premises, which was matured and gathered before the levy on the land, as will defeat the right of the family of the vendee to the crop as an exemption, etc., under the homestead law. *Johnson vs. Holmes* 365
6. To entitle a mechanic to a summary enforcement, under section 1969 of the Revised Code, and Act of 16th September, 1870, of a lien claimed by him, it must ap-

- pear in the proceedings that the claim is for the labor of the mechanic himself, or for material furnished by him. *Wooten et al., vs. Archer*..... 388
7. A and B, mechanics, sued out an execution, which was void under the foregoing rule, against T. A, and a house built under a contract with him. The execution was levied on the house. It was sold by the sheriff and bought by Wooten & Taylor, the defendants. The lot on which the house stood belonged to E A, who brought ejectment against Wooten & Taylor. The defendants set up, by plea, that E A lived adjoining to the lot where the house was being built, and never gave notice of her right or title, and that from such default on her part, the builders would, in equity, have a lien on the house for the unpaid portion of their claim, and that the purchasers at sheriff's sale should be subrogated to their rights and allowed the amount that was due the builders. T A, who had the house built, was not a party to the cause, nor did it appear what the debt against him was, except by the illegal proceedings to enforce the lien claimed: *Held*, That even if the defendants could, with proper parties and proof, assert such an equity, yet it was necessary that T A should have been made a party, and the amount of his debt due the builders should have been shown by evidence other than the void proceedings to enforce the mechanics' lien. *Ibid*.
8. The Act of 1869, so far as it may be considered as a legislative interpretation of the meaning of the Constitution, only gives a summary remedy for the enforcement of mechanics' and laborers' liens upon the property of their employers, when the debt is due for the labor actually performed by them, and for the materials furnished, with which and upon which the labor has been performed. *Savannah and C. Railroad Company vs. Callahan*..... 506
9. Though contractors may be mechanics, yet this fact does not entitle them to the benefit of the provisions of the Act of 1869, if the work is done by them as contractors, through the labor of others employed by them for that purpose. *Ibid*.
10. A factor or merchant holding a lien under section 1977, Irwin's Revised Code, when the maker thereof is dead, may, in order to preserve his lien and such



- priority as he may be entitled to, if any, in the distribution of his debtor's estate, make the affidavit required by law for its enforcement within twelve months after the qualification of the representative of the estate, but there can be no levy of the execution issued thereon until after the expiration of the period of exemption from suit, allowed executors and administrators. *Moring vs. Flanders, adm'r*..... 594
11. When a commission merchant and factor advanced money to a planter to purchase supplies, the planter agreeing, in writing, to deliver to the factor, at his own house, in Macon, enough of the crop upon which the money was thus advanced to pay for the said advance, and the planter accordingly did deliver at the depot of the Southwestern Railroad at Montezuma, such cotton, consigned to the factor, at Macon, and after such delivery the cotton was seized to satisfy a lien under the Act of 1866, given to a third person and prior to the factor's advance, but not foreclosed until after the delivery of the cotton at the depot, so consigned to the factor:
- Held*, That the delivery at the depot of the cotton consigned to the factor, was, for the purpose of the lien, a delivery to the factor, and his special property thereupon attached, even against other liens under the Act of 1866, given prior to the factor's advance, if the factor had no notice of said liens prior to his advance, and there was no foreclosure of the prior lien before the delivery at the depot, as described. *Hardeman & Sparks vs. De Vaughn*..... 596
12. If an issue be made upon a lien foreclosed under the steamboat lien law by affidavit, or if there be a claim to the property, the papers are to be returned and the issue tried in the county of the residence of the defendant. *Ibid*.
13. Where a planter contracted a debt with a factor for provisions to make his crop, and gave a lien on his crop for the payment thereof, and of any attorney's fees for the enforcement thereof, and no action was taken to enforce the lien, but only a suit for the debt, claiming such fees as due for such suit:
- Held*, That the lien for attorney's fees was not a good lien under the Act of 1866, authorizing liens to secure the payment of money due for provisions, etc., and that

- such fees are not recoverable in a suit at law for the debt. *Rodgers et al. vs. Hamilton*..... 604
14. Land was devised to the wife for life, and at her death to be equally divided between two daughters, L. and E. Judgments were obtained against the representative of the estate on debts due by the testator. After the rendition of the judgments and death of the tenant for life, the land was equally divided between the daughters, L. and E. Subsequent to this L. mortgaged the portion she received to C. Plaintiffs in the judgments caused their executions to be levied on the share received by E. The executions not being satisfied from the proceeds of this levy, they were levied on the land of L. C., the mortgagee, filed a bill to enjoin the sale under this levy, on the ground, amongst others, that plaintiffs made an agreement with E. or those holding under her, whereby they remitted all claims on her land for \$1,000 00, when the same was worth nearly four times that sum, and that thereby the whole of the balance of the executions, amounting to about \$6,000 00, is sought to be enforced against the land of L., on which he holds the mortgage:
- Held*, That the right of contribution existed between L. and E. as to the payment of the executions, and if the creditors discharged all claims on the land of E. for less than the proportionate share of her liability to contribute to L., C., as the creditor of L., by mortgage, which has been foreclosed, is entitled to assert her rights, as well as his own equities arising out of such facts, against such creditors. *Compton & Sons vs. Pitman et al.*..... 612
15. If the facts recited are established on the final hearing, and a sufficient showing was made on the application for injunction, to entitle complainant to such hearing—only one-half of the amount of the executions—not deducting the credit of \$1,000 00 collected of E., should be enforced against the land mortgaged to C. The levy should proceed and the land be sold, and the amount it may bring, in excess of one-half of the executions, should be impounded by direction of the Chancellor to abide the final determination of the cause. *Ibid.*

LIMITATIONS—STATUTE OF.

1. When an account became due on the 20th December, 1860, and suit was brought thereon on March 1st, 1869, the claim is not barred by the statute of limitations. *Shorter vs. Marshall*..... 31
2. The eighth and twenty-ninth sections of the Act of 1856, prescribing that after seven years without an entry, etc., a judgment shall not be enforced, but shall be presumed to be satisfied, and also that where a *bona fide* purchaser has been in the possession of real property four years, it shall be discharged of the lien of any judgment against the person from whom he purchased, were parts of a statute of limitation in force on the 30th of November, 1860, and were by the terms, spirit and intention of the Act of that date suspended; and by the various Acts from 1860 to 1865, the suspension was continued until the close of the war. *Akin vs. Freeman*..... 51
3. In a suit by a widow, in this State, against a railroad company for the killing of her husband in the State of Alabama, the declaration cannot be amended after the lapse of one year from the alleged killing, for the reason that the statute law of Alabama limits the right to recover damages therefor to one year from the time of the death, and gives the right of action to the personal representative of the deceased. *Selma, Rome and Dalton Railroad Company vs. Lacey*..... 106
4. On August 10th, 1859, a verdict was rendered in favor of B. and wife against R. "for the premises in dispute, and \$200 00 for rent," on a bill filed by B. and wife against R., claiming one undivided half of a certain lot of land, to-wit: one hundred and one acres. Upon this verdict a decree was entered in favor of the complainants for fifty-one and a half acres off the southeast corner, and fifty-one and one-half acres off the northwest corner of said lot, also for the rent, and directing the sheriff to place the complainants in possession. An attempt was made to divide the lot in accordance with this decree, but R. objected, as it interfered with his possession which he had held for many years under his deed, and under a division had between him and B. and wife many years before the filing of said bill. Nothing more appears to have been done towards the enforcement of said decree, except that R.

- paid the \$200 00 for rent and abandoned all that part of the land which B. and wife claimed under the original division. On February 2d, 1870, a writ of possession was ordered to be issued on said decree to put one S., who was not a party to the same, in possession of the southeast corner of said lot. R. filed his bill to reform said decree and to enjoin said writ of possession. The Court charged the jury that if R. knew of the decree, he had delayed too long in filing his bill to reform the same, to be allowed the relief prayed for. This charge was error. *Renew vs. Darley et al.*..... 332
5. The statute of limitations applicable to bills of review was suspended from November 30th, 1860, to July 21st, 1868. *Ibid.*
6. Where a grantee in a deed, executed in 1849, absolute on its face, but the grantor remaining in possession of the property, filed a bill in 1871 against the administrator of the grantor, alleging that there was a parol trust attached to the contract under which the deed was made, to-wit: that it was a transfer of the property in trust for the payment of a debt due the grantee and others by account, and the prayer of the bill was for a decree that the land should be sold and so appropriated:
- Held*, That under the allegations in the bill and the proof at the hearing, complainant was not entitled to any greater rights than a mortgagee would have where the mortgagor remained in possession, or than if the debt had been by a security under seal; and he is barred by the Act of March 16, 1869, in accordance with the decision made during the present term in the case of *John George vs. James Gardner. Davidson, administrator, vs. Lawrence, assignee.*..... 335
7. Where medicines were delivered to the defendant prior to 1860, to be sold on commission, and a demand was made by the plaintiffs for a settlement in 1871, when the defendant still had some portion of the drugs on hand, and suit was commenced on August 7th, 1872, said action was not barred by the statute of limitations, it being within four years from the time of the demand. *Jaynes & Son vs. Sheffield* 354
8. The general rule is, that statutes of limitation do not apply to bank bills, because they are by the consent of mankind and course of business, considered as money,

- and that their date is no evidence of the time when they were issued, as they are being continually returned to and reissued by the bank. But if the bills have ceased to circulate as currency, and have ceased to be taken in and reissued by the banks, they no longer have that distinctive character from other contracts, which excepts them from the operation of the statute of limitation. *Kimbrow vs. Bank of Fulton*..... 419
9. If the bills of the bank of Fulton had thus lost this distinctive character prior to the first of June, 1865, they come within the provisions of the Act of 16th March, 1869, entitled "An Act in relation to the statutes of limitation and for other purposes." *Ibid.*
10. It is necessary in a plea of the statute of limitations by a bank when sued on its bills, to aver the facts which take them out of the ordinary rule, to-wit: that the statute does not apply to such contracts. *Ibid.*
11. A note executed in January, 1865, and due in December of the same year, was not, on the 15th of June, 1871, barred by the statute of limitations, nor was the holder thereof prevented at that time, by the Act of March 16th, 1869, from pleading the same as a set-off to an action pending against him by the maker. *Black vs. Swanson*..... 424
12. An account was contracted with a merchant on the 31st of January, 1866. Suit was instituted on the account on the 19th March, 1870. It did not appear in evidence on the trial that, by contract or custom, day of payment was given when the goods were sold:
Held, That under the 8th section of the Act of March 16th, 1869, entitled "An Act in relation to the statute of limitations, and for other purposes," the right of action in this case is controlled and governed by the limitation laws as set forth in the Revised Code of Georgia, adopted by the new Constitution of this State, and said limitation laws requiring suits to be brought within four years on accounts, the right of action was barred when this suit was instituted. *Addison, adm'x, vs. Christy & Co.*..... 431
13. The foreclosure of a mortgage is a suit within the contemplation of the Act of March 16th, 1869; and if the instrument was executed before June 1st, 1865, and proceedings to foreclose were not instituted until

- after January 1st, 1870, they are barred by the provisions of said Act. *George vs. Gardner*..... 441
14. The Limitation Act of 1869 is a general law, and has a general operation throughout the State as to that class of contracts specified in it, and, therefore, does not come within the purview of the 26th section, 1st Article of the Constitution of 1868. *Ibid.*
15. This Act does not impair the obligation of the contract; it only affects the remedy. *Ibid.*
16. The plaintiff having an agent in this State in possession of the mortgage, and having control of its collection, the fact that he was a resident of Ireland, will not prevent the statutory bar. *Ibid.*
17. The credits on the notes, to secure which the mortgage was given, not being made by the mortgagor, or by any one authorized by him, do not renew the right of action. *Ibid.*
18. As to the suggestion of fraud, if there was any evidence of it to prevent the running of the statute of limitations, that was a question of fact for the decision of the Court, under the submission of the parties, and this Court will not interfere. *Ibid.*
19. The Limitation Act of March 16, 1869, applies as well to debts, the consideration of which was slaves or the hire thereof, as to other debts. That part of the Constitution of 1868, denying jurisdiction to the Courts of suits on such debts having been declared void by the Supreme Court, there was in fact no prohibition of such suits. *Harris et al. vs. Gray, ex'r.* 585
20. As an additional reason why the amendment should not be allowed in this case, it is apparent that the implied trust for which it seeks to make the defendant liable, is barred by the statute of limitations. *Smith, adm'r, et al., vs. Ardis, trustee*..... 602

MASTER AND SERVANT.

When a declaration alleging that A. having, on the 1st of December, 1871, contracted with one Charles Barron, that he, the said Charles, should furnish himself and his two daughters and one George Barron to work as laborers on plaintiff's land, during the year 1872, the plaintiff to furnish the land and mules, and the said Charles to receive one-third and plaintiff two-

thirds of the crop, and that the defendant, knowing the said contract had not been abandoned, but still existed, did, on the 25th of December, 1871, employ the said Charles, his two daughters, and the said George, to work for him for 1872, and that at the time of the bringing of the suit, to-wit: February, 1872, the said Charles *et al.*, were working for the defendant to plaintiff's damage, \$500 00:

Held, That no good cause of action is set forth in the plaintiff's writ. *Barron vs. Collins*..... 580

MECHANICS' LIEN. See *Lien*, 6, 7, 8, 9.

MINOR. See *Husband and wife*, 1.

MISTAKE.

To entitle a party to recover back money which he has paid, on the ground that it was paid to the defendant through a mistake or ignorance of facts, which he sets up as showing there was no legal liability on him to pay, the plaintiff should allege and show on the trial that at the time of the payment he was mistaken as to such facts, or ignorant of their existence. *Camp vs. Phillips, adm'x*..... 455

MORTGAGE.

1. When A filed a bill against the City Bank of Macon, charging that he was the holder of a mortgage made by B on certain real estate, founded on a valuable consideration; that the said City Bank was also the holder of a mortgage made to it by B upon the same property; that the mortgage to the bank was given to secure the payment of a note made to the bank by B for the loan of money at more than seven per cent. per annum, and was therefore null and void; that it was of older date than the mortgage to A; that the junior mortgage contained upon its face notice of the mortgage to the bank; that the mortgage to the bank had been regularly foreclosed by rule *nisi*, notice and judgment of the Superior Court of the county of Putnam, where the land was situated, and ordered to be sold to satisfy it; that B was insolvent, and that unless A could set aside this illegal mortgage, he would lose his money. The bill prayed an injunction. The defendant, on

the rule to show cause, denied there was equity in the bill, and insisted that if the complainant had any remedy, it was at law, under sections 3903 and 3892 of the Revised Code. The Judge refused the injunction, and the complainant excepted :

Held, That there was no error in the judgment of the Court refusing the injunction. Admitting that the note, to secure which the mortgage to the bank was given, is null and void for usury, if the complainant has any remedy, it is only under sections 3903 and 3892 of the Code, and as that remedy, if it applies to his case, is made ample and complete, equity has no jurisdiction. *Gatewood vs. City Bank of Macon et al.* 45

2. It is a well settled rule of law that parties may, if they please, *really* and *truly* sell property for a consideration actually passing, and at the same time secure the right to repurchase it at a future time for an agreed price, and if this be really the intent of the parties, the law will enforce it. It is also true that the difference between such a transaction and a mortgage is often a very nice one, and that the Courts will scrutinize the matter very closely to discover whether there was, in fact, anything more intended than to provide a security for money due or advanced at the time, and all the facts will be looked to in search of the truth of the case. The great cardinal rule for testing the intent seems to be whether or not the relation of debtor and creditor was intended to exist between the parties—whether the property was taken in *satisfaction and discharge* of the sum due or advanced; or whether, notwithstanding the words of the conveyance, the relation of debtor and creditor was still to exist, to-wit: the right of the one to demand, and the obligation of the other to pay. Under this rule, we think, from the bill and answers, that the transaction began in June, 1871, by the complainant's offer, and accepted and acted on by both in September, 1871, as evidenced by the complainant's proposal, the defendants' acceptance, and the deed, lease, bond and payments furnish, so far as appears from the face of the papers, or from any facts appearing at the hearing, taking the answers of the defendants as evidence, was a contract of sale, lease and agreement to permit the complainant to rebuy, and not a loan of money, and scheme to evade the usury laws; at least, that under the uncontradicted answers of the defend-

ants, it was error in the Judge to have considered the charges of the bill so far made out as to justify the injunction on that ground. What may be the truth of the case, as it may be made out at the trial before a jury, is not now the question. *Spence et al. vs. Steadman*..... 133

3. Where H. bought a stock of goods from A., executing a mortgage on the same to secure the purchase money, and subsequently formed a copartnership with S., the latter agreeing to furnish goods equal in value to those put in by H., and goods were purchased by the firm and added to the stock on hand to supply the place of sales made:

Held, That the purchases made by the firm of S. & H. to supply the deficiency made by sales from the stock originally bought from Anderson, are not subject to the execution issuing upon the foreclosure of the aforesaid mortgage. *Anderson vs. Howard & Sims*..... 313

4. Where a mortgage is executed upon a stock of goods, some of which are subsequently sold and others purchased to supply their place, the mortgage lien attaches to the purchases made, to the extent of the value of the stock originally mortgaged. *Ibid*.

5. Where a grantee in a deed, executed in 1849, absolute on its face, but the grantor remaining in possession of the property, filed a bill in 1871 against the administrator of the grantor, alleging that there was a parol trust attached to the contract under which the deed was made, to-wit: that it was a transfer of the property in trust for the payment of a debt due the grantee and others by account, and the prayer of the bill was for a decree that the land should be sold and so appropriated:

Held, That under the allegations in the bill and the proof at the hearing, complainant was not entitled to any greater rights than a mortgagee would have where the mortgagor remained in possession, or than if the debt had been by a security under seal: and he is barred by the Act of March 16, 1869, in accordance with the decision made during the present term in the case of *John George vs. James Gardner. Davidson, adm'r, vs. Lawrence, assignee*..... 335

6. Where, after the levy of a mortgage *fi. fa.*, the property subject thereto was, by consent of the mortgagor

- and mortgagee, sold by auctioneers, and the proceeds paid into Court for distribution, the assignee of the mortgagor, proceedings in bankruptcy having been, previous to said sale, commenced against him, was entitled to the fund. If the money in controversy had been raised by a judicial sale of the property of the bankrupt by the sheriff, on final process, in the enforcement of a lien of a prior date to the commencement of the proceedings in bankruptcy, there would have been no impropriety in the appropriation of the same to the satisfaction of the mortgage lien. *Morris vs. Davidson, assignee*..... 361
7. The foreclosure of a mortgage is a suit, within the contemplation of the Act of March 16th, 1869; and if the instrument was executed before June 1st, 1865, and proceedings to foreclose were not instituted until after January 1st, 1870, they are barred by the provisions of said Act. *George vs. Gardner*..... 441
8. Where A approached B for the loan of money, offering a mortgage upon property to secure the repayment, and B declined, but said that A could get the money if he would *deed him* the property, and A made an absolute deed, taking B's bond to *deliver back the deed* on the payment by A of a sum which was just the amount of the money got by A with a certain amount per month rent, and the possession was not changed in fact, nor the deed recorded:
- Held*, That whether the transaction was a sale with a right in the vendor to repurchase, or whether the whole was a ruse devised to evade the usury laws and to take a security for the loan of money, was a question of fact for the jury, and the jury having, under the evidence, decreed the cancellation of the deed on the payment of the amount due, the verdict ought, under the evidence in the record, to stand. *Monroe vs. Foster*..... 514
9. Where H. is indebted to S., and to secure him for the debt due, and for a further advance of money made by him to H., H. and his wife, with the approval of the Ordinary, convey the homestead which had been set apart for the benefit of the family of H. to the creditor, and he, at the same time, takes the notes of the husband for the debt, and executes a bond to make titles to him for the same land, upon the payment of the notes:

- Held*, That the whole transaction constitutes nothing more than a mortgage, and the rights of the beneficiaries of the homestead arising out of these facts can be set up by the husband in an action against him by the creditor to recover the land. *Shaffer vs. Huff*. 589
10. Where an affidavit of illegality was filed to a mortgage execution on the ground that it had been paid, it was error to allow, upon the trial of the issue thus formed, a motion to be made to dismiss the levy and the execution on the ground that the mortgage was upon a growing crop, and, therefore, void. *Monroe, Jr., vs. Castleberry*..... 630

MUNICIPAL CORPORATIONS.

1. The principle that the owner of a building erected on the line of his lot, may, by lapse of time, acquire a prescriptive right to the lateral support of the adjacent soil, does not exist in this State, especially against a public or municipal corporation. *Mitchell et al. vs. Mayor and Council of Rome*..... 19
2. If the work of grading a street, such as digging below the foundation of a wall, or under a wall and underpinning the same, be done by the consent or direction of one of the joint owners of such wall, neither of the owners can recover damages from the City Council by whose laborers the work was done, on account of the falling of the wall being caused by such work. *Ibid*.
3. Where it was a question at issue whether such consent or direction was thus given, it was error in the Court to charge the jury as follows: "What they (the City Council) do, so far out of the line of their own business as to be evidently done in the execution of somebody else's job, if such owner was present and knew what was going on and made no objection, will be presumed to be done by consent or direction of such property owner, if nothing appears to the contrary. But this presumption may be rebutted by any sufficient facts or circumstances, such as that the owner of the property protested against it," etc. The jury had the exclusive right in this case to determine what presumption arose from the facts proven by the evidence. *Ibid*.
4. It is the duty of a municipal corporation, vested by law with authority over the streets, whilst dangerous

works, such as sewers, etc., are being constructed across a street, to have proper precautionary measures taken to prevent accidents to passengers during such construction, whether the same is being done by the corporation through its own servants, or by contract, or by sub-contractors under a primary contractor. Such duty, at least, in the cases of independent contractors or sub-contractors is not founded on the principle of *respondeat superior*, but is deducible from the authority in the corporation over the streets and the obligation flowing therefrom to protect the public against nuisances or dangerous obstructions in the highways of the city. *Mayor and Aldermen of Savannah vs. Waldner*..... 316

5. In an action by a plaintiff against a corporation for damages caused to his person and property on account of the default of defendant under the foregoing rule, it was error in the Court to charge the jury, "that in estimating the damages they could take into consideration the expenses to which plaintiff had been put in and about his said suit," there being no proof of what such expense was, and such expenses are only recoverable "when the defendant has acted in bad faith, or has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense." *Ibid.*
6. By the original charter of the city of Savannah, the streets of the city could not be granted for any purpose, except by Act of the General Assembly; it was not competent, therefore, for the Mayor and Aldermen to authorize the erection of a market house in St. Julian street, even temporarily, if it deprived any of the inhabitants of said street of the use and enjoyment thereof. *M. and A. of Savannah vs. Wilson & Gibson*.... 476
7. All acts of a municipal corporation beyond the scope of the powers granted to it are void. *Ibid.*

NEW TRIAL.

1. The evidence in this case is of such a character that this Court cannot say that the presiding Judge committed an error in refusing a new trial. *Kelly vs. The State* 12
2. Where the verdict of the jury did substantial justice, and the Court below was satisfied with it, this Court will not disturb their finding. *Shorter vs. Marshall*... 31
3. The verdict in this case is not so strongly and decid-

- edly against the weight of the evidence in reference to the value as to authorize it to be set aside, when the question was fully and distinctly submitted by the Court to the jury. *Crawford et al., ex'rs, vs. Ward...* 40
4. The verdict in this case is not contrary to the evidence, except as to the amount of \$150 00 per annum, found for the complainant against the defendant, for four years' use of the land in controversy, the profits derived from such use not exceeding the just claim of defendant against complainant, and, therefore, if the complainant will write off this amount from his verdict the judgment should be affirmed, otherwise reversed. *Gunn vs. Calhoun*..... 76
5. As the record does not show the charge of the Court on the question of the statute of limitations, and as that depends on the fact whether the prior possessions to which defendant must tack his, were adverse or not, and whether his or those to which he must so tack were in succession, all of which was a matter for the jury, under the charge of the Court, we do not feel authorized to interfere with the verdict on the ground that it was contrary to law or against the evidence. *Hulsey et al. vs. Clark*..... 99
6. Where on a motion for new trial one of the grounds insisted on was, that one of the jury who tried the cause was asleep during a portion of the trial, and no affidavits were filed with the motion, but it was proposed to show by parol, at the hearing, that such was the fact, and the Court refused to hear the witnesses, and refused also the new trial:
Held, That the proof ought to be made as a part of the motion in writing, by affidavits attached, and that a new trial ought not, in any event, to be granted on such a ground unless it affirmatively appeared that the prisoner and his counsel did not know the juryman was asleep before the jury retired to find a verdict. *Cogswell vs. The State*..... 103
7. When the Judge of the Superior Court has granted a new trial, on the ground that the verdict is contrary to the evidence, this Court will not interfere to reverse his judgment, even though there be some evidence to sustain the verdict, it not appearing that the Judge has abused the discretion granted him by law in such cases. *Johnson vs. McComb, ex'r*..... 120

8. Though the statement of an obligee in a bond for titles, made to his assignee at the time of its transfer, to the effect that the purchase money was payable in Confederate currency, is not admissible as evidence against the obligor, yet if there be other testimony sufficient to authorize the jury to scale the claim under the Ordinance of 1865, and they do so scale it, this Court is not bound to grant a new trial, especially if substantial justice appears to have been done. *Williams et al., ex'rs, vs. Phipps.* 175
9. This Court will presume that the Court below had good and sufficient grounds for the postponement of the hearing of the motion for the new trial as it did, in the absence of any showing to the contrary, and that the defendant's counsel was not in default in not filing the brief of the evidence within the fifteen days after its approval and order to file it by the Court. *Mayor and Council of Cuthbert vs. Brooks et al.*..... 179
10. This Court has no lawful power or authority to control the discretion of the Superior Courts in the legitimate exercise of their discretion in conducting the business before them, unless that discretion has been abused, or some law of the land violated. *Ibid.*
11. Newly discovered evidence which is merely cumulative is no ground of new trial. *Malone vs. The State.* 210
12. Evidence is cumulative when it goes to the fact principally controverted upon the trial, and respecting which the party asking for a new trial produced testimony. *Ibid.*
13. Newly discovered evidence, which might have been obtained by the exercise of ordinary diligence before the trial, is no ground of new trial. *Ibid.*
14. Where a motion for a new trial was made at the term of the Court at which the verdict complained of was rendered, and was overruled, which decision was affirmed by this Court, to authorize a second motion, such an extraordinary state of facts would be required as would probably produce a different result, if a new trial should be granted; and such extraordinary state of facts must have been unknown to the defendant or his counsel, at the time of the first motion, and impossible to have been ascertained by the exercise of proper diligence for that purpose. *Malone vs. Hopkins, Judge.* 225
15. There being no extraordinary facts set forth in the

- second motion for a new trial which would entitle the defendant to another hearing, the application for a *mandamus* to compel the Judge's certificate to the bill of exceptions, is refused. *Ibid.*
16. Although it may be necessary for the plaintiff to aver in his pleadings the fact that he is the survivor, as well as the facts as to the second sale, in order to be entitled to prove them as a matter of right, yet if the testimony be admitted without objection, and no motion is made to withdraw it from the jury, he is entitled to the benefit of such testimony on a motion for a non-suit. *Field, Jr., vs. Martin, adm'x*..... 268
17. There was no abuse of discretion by the Court below in granting the new trial in this case. *Murphy et al. vs. Harris*..... 292
18. Where a new trial was granted on an agreed state of facts, which judgment was reversed in this Court, it is competent for the movant to amend his motion before the judgment of this Court is made the judgment of the Superior Court, by showing that the facts were agreed to under a mistake as to their truth. *Daniel, adm'x, vs. Foster, adm'r*..... 303
19. When a judgment has been *affirmed* on a statement of facts contained in the bill of exceptions, a different question might arise, but in this case the judgment was *reversed*, and the whole case was open for further investigation, and the truth may be shown. *Ibid.*
20. The verdict in this case is sufficiently sustained by the evidence to justify the Court below in refusing a new trial on the ground that it was contrary to evidence. *McAlister vs. The State* 306
21. The discretion of the Superior Court in granting a new trial upon the ground that the verdict is contrary to the evidence, will not be interfered with unless abused. *Deupree et al., ex'rs, vs. Deupree et al., caveators*..... 325
22. Where the defendant, who was a surgeon and a physician, was prevented from being in attendance upon the Court at the time of the trial of his case, by an urgent call upon him in his professional capacity, which it was his paramount duty to obey, and it was made to appear, by affidavit, that his evidence would have been material, and that his counsel were deprived of his aid in the defense, this Court will not control the discre-

- tion of the Court below in ordering a new trial. *Powell vs. Westmoreland*..... 341
23. An immaterial error is no ground of new trial. *Huff vs. Odom*..... 395
24. There being nothing in the record showing that the case was not fairly submitted to the jury, and as the verdict was to be determined according to the credit they might give to the testimony of a witness who was a party to the suit, this Court will not interfere by setting aside the verdict, especially as it does not appear that the jury abused their right in the premises as to the credibility of the witness, under the circumstances exhibited in the record. Under the Act of December 15th, 1866, juries have a larger discretion as to the credit they will give such witnesses, than in the case of witnesses who are not parties. *Penny vs. Vincent*.. 473
25. Whilst this Court will be slow to interfere with the verdict of a jury in a libel case, on the ground that the damages are excessive, yet, in such cases, it will look closely into the rulings of the Court, and if there be errors which may have influenced the jury in the amount of their verdict, a new trial will be granted. *Ransone vs. Christian*..... 491
26. The evidence being conflicting and the Judge trying the case having refused a new trial, this Court will not interfere, as there is sufficient evidence to support the verdict. *Skinner et al. vs. Allen, Preer & Ilges*..... 557
27. The evidence being conflicting, and inasmuch as the Court refused to allow the defendant to be recalled to prove a fact inadvertently omitted, the discretion of the Court below in granting a new trial will not be controlled. *Wadford vs. Rhodes*..... 561
28. There was no abuse of the discretion of the Court in refusing to grant a new trial in this case. *Taylor vs. Martin*..... 572
29. The verdict in this case being strongly and decidedly against the weight of the evidence, the discretion of the Court below in granting a new trial will not be controlled. *Sams & Arthur vs. Tracy, Irwin & Co*.... 588
30. The evidence in this case as to the distance the horse ran on and by the track before he was killed, was not only conflicting, but was such, when connected with the other facts proven, as to make it a proper case for the jury to decide the question of negligence on the

- part of the railroad, and there being no misdirection by the Court to the jury, we cannot disturb the verdict. *Atlantic and Gulf R. R. Co. vs. Burt*..... 606
31. There being no error of law committed, the finding of the jury on the facts will not be interfered with. *King et al. vs. King et al.*..... 622
32. The verdict being manifestly against the charge of the Court as to the liability of one of the defendants, a new trial was properly granted as to him. *Ibid.*
33. As special verdicts may be found upon the trial of equity causes, there was no error in overruling the motion for a new trial as to some of the defendants, and granting it as to others. *Ibid.*

OFFICERS.

1. The Supreme Court of this State having decided in *Gormley vs. Taylor*, 44 Georgia, 76, that the District Judges were legally appointed and in office, and said Judges having continued to act for nearly one-half of their actual period of service after said decision was made, and the General Assembly, by an Act passed December 7th, 1871, by a majority of two-thirds of each branch thereof, repealed the Act organizing said Court, having recognized the legal existence and authority of said Court and Judges thereof, in enacting that "It shall be the duty of the clerk of the District Court to transmit all cases now pending on the civil or criminal docket of said Court to the Superior Court, which said Court is hereby vested with jurisdiction over the same," constitute sufficient authority to determine the question as to the right of said officers to compensation, and that they are entitled to compensation for services rendered as such. *Holtzclaw vs. Russ, Ordinary; Giles vs. Same.*..... 115
2. Under the provisions of the Constitution requiring an "equitable apportionment of the compensation of the District Judges and attorneys between the counties comprising their districts," the tax required by the Act organizing said Court to "be levied in the several counties composing each Senatorial District * * * upon the taxable property returned therein as together, will raise an amount sufficient to pay the salaries," etc., should be apportioned between said counties in pro-

- portion to the amount of taxable property returned in said counties, respectively. *Ibid.*
3. Interest on an unpaid salary of such officer cannot be enforced against the county out of which the same is to be collected. *Ibid.*
 4. Where the clerk and treasurer of the city of Cuthbert was elected for the year 1867, and gave bond for the faithful performance of his duties "for the present year," but at the expiration of said year held over during the next until he was suspended, no successor having been appointed, it was not error in the Court to charge, upon the trial of an action brought on said bond, that said treasurer and his securities were liable for all moneys that came into his hands, as such treasurer, until his successor was appointed. *Mayor and Council of Cuthbert vs. Brooks et al.*..... 179
 5. It was competent for the General Assembly, after the year 1868, to provide for the election and succession of the county officers of the State, as was done under the 3d section of the Act of 1872, and an Ordinary elected under the law and commissioned by the Governor, will not be ejected upon the relation of one claiming to have been elected under the provisions of the 1346th section of the Code. *Crisp, Sol. Gen. ex rel. vs. Brown.* 190

ORDINANCE OF 1865. See *Scaling Ordinance.*

ORDINARY. See *County Matters*, 1, 2.

PAROL EVIDENCE.

See *Evidence*, 3, 6, 7, 8, 10, 14.

PARTITION.

1. When a bill was filed seeking the partition of a lot of land between tenants in common, and an account, the complainants claiming seven-eighths and the defendants one-eighth, and fails to show whether the defendants were in possession of a greater portion of the land than their share, or whether said defendants were holding adversely to the complainants, or anything going to show a liability on the part of the defendants, as tenants in common, to account for the rents and profits of the land, a demurrer thereto was properly sustained. *Lansdale et al. vs. Brown et al.*... 278

2. If the other allegations in the bill had been sufficient, the number of parties defendant might have been a good ground for equity jurisdiction to prevent a multiplicity of suits. *Ibid.*

PARTNERSHIP.

1. Where H. bought a stock of goods from A., executing a mortgage on the same to secure the purchase money, and subsequently formed a copartnership with S., the latter agreeing to furnish goods equal in value to those put in by H., and goods were purchased by the firm and added to the stock on hand to supply the place of sales made :
Held, That the purchases made by the firm of S. & H. to supply the deficiency made by sales from the stock originally bought from A., are not subject to the execution issuing upon the foreclosure of the aforesaid mortgage. *Anderson vs. Howard & Sims*..... 313
2. If articles are purchased by a partner for the legitimate use and business of the firm, then both partners are liable for the payment therefor, notwithstanding the other partner may have notified the vendors of the articles not to extend credit to his associate on account of the partnership. *Campbell & Jones vs. Bowen & Bird*..... 417
3. Suit having been brought against partners jointly, the verdict should have been rendered against both and not against one only. *Ibid.*
4. The legal representative of a deceased partner may be sued in the same action with the survivor, on a firm contract. *Garrard, ex'r, vs. Rawson*..... 434
5. Where, after the dissolution of a firm, new notes are given by one of the partners in the firm name, the evidence should be clear and satisfactory of the notice of such dissolution to the creditor accepting such notes, to discharge the other partner. *Ransom & Co. vs. Loyless & Co*..... 471
6. Where a firm is sued on notes, and one of the firm pleads *non est factum*, the other making no defense, the evidence being conclusive that the notes were signed by him, a verdict for the defendant is contrary to law. *Ibid.*

PLEADINGS.

1. A plea, although filed in 1866, to a suit on a contract, when the case was not tried until 1872, should have been sworn to before the trial, and a demurrer to the plea, on the ground that it was not sworn to, was properly sustained. *Cherry vs. Rawson*..... 228
2. If the obligor in the bond, after its execution, sell the land to a third person, giving such person a bond for titles, puts him in possession, and receives the whole of the purchase money, it is a breach of the first bond, and no demand for a deed is necessary before action is brought. *Field, Jr., vs. Martin, adm'r*..... 268
3. Although it may be necessary for the plaintiff to aver in his pleadings the fact that he is the survivor, as well as the facts as to the second sale, in order to be entitled to prove them as a matter of right, yet if the testimony be admitted without objection, and no motion is made to withdraw it from the jury, he is entitled to the benefit of such testimony on a motion for a non-suit. *Ibid.*
4. It is necessary in a plea of the statute of limitations by a bank when sued on its bills, to aver the facts which take them out of the ordinary rule, to-wit: that the statute does not apply to such contracts. *Kimbro vs. Bank of Fulton*..... 419
5. When a defendant sets up by plea that the contract is void under the Constitution, because it was made for the purpose of aiding and encouraging "*the late rebellion*," it is necessary that the facts should be stated in such plea, going to show how and in what way the contract was intended to give such aid and encouragement. *Ibid.*
6. When, amongst other defenses, such pleas have been filed, and stricken by the Court on demurrer, and such decision excepted to and exception certified and entered on the minutes, it is competent for the defendant to amend the pleas on a new trial, which has been granted to the plaintiff. *Ibid.*
7. If, in an action for a libel, the defendant pleaded justification, and failed to make out his plea, the plea itself is a circumstance which the jury may, in fixing the amount of damages, consider as aggravating the tort, but the jury is not bound, in all cases, so to con-

- sider it; on the contrary, if the defendant show strong grounds in support of the charge he has made, though he does not fully support his plea, the jury may, if it see fit, consider these grounds as mitigating circumstances, and reduce the damages accordingly. *Ransome vs. Christian* 491
8. In this State, as provided by section 3261, Code of 1873, the defendant, in an action *ex delicto*, may plead, as a defense, any claims he may have against the plaintiff, which arises *ex delicto*. *Ibid*.
9. In an action against a railroad company on a contract instituted in a county other than the one where its chief office of business is located, the pleadings should show that the contract was either made or was to be performed in the county where such suit was brought. *Corley & Dassetts vs. Ga. R. R. & Banking Co.*..... 626

POLLING JURY. See *Jury*, 4.

PRACTICE IN THE SUPERIOR COURT.

1. When an action of trover was called for trial, and the plaintiff's attorney stated to the Court that a case before it on the docket was ready for trial, both parties being ready, and asked that the older case be taken up, as it being early on the first day of the term, neither his client nor his witnesses were yet present; that various witnesses, as appeared by the docket, had been subpoenaed, and that, as he was informed, they would prove certain facts which would fully sustain the suit, and the Court failing to find said older case on the docket, though it was in fact there, refuse to delay the case or continue it, (the docket showing two continuances already by the plaintiff,) and dismissed the suit; and afterwards, on the next day, the plaintiff moved to reinstate the case, stating that he was ready for trial; that he had been detained at home the previous day until late by an unusual storm, which had blown down his fences, and he was compelled to put them up or lose his crop, and that as soon as he could do this he had hurried to town; was told by his attorney to get up his witnesses, as his case might be called at any time; that he had forthwith gone after one of them at his house in town, and during this, his temporary absence, his case was dismissed, that he had

- now his witnesses present, who would prove certain facts making a full support of his action:
- Held*, That the Court erred in refusing to reinstate the case. *Byce vs. Ross, adm'r*..... 89
2. Where, during the session of the Court, leave of absence for the term is granted to an attorney, and in a short time afterwards, the attorney being present in Court, it was not error for the Judge, in order to prevent the continuance of a case in which such attorney was the leading counsel, to call the case for trial out of the regular order, unless it was made to appear that the attorney or his client was less prepared for trial on account of such leave of absence having been granted, or than they would be if the case were not called out of its order. *White et al. vs. Haslett et al., ex'rs*..... 280
 3. A Judge of the Superior Court cannot open Court and receive a verdict from the jury on the Sabbath day, and such a verdict so rendered is illegal and a nullity. *Bass vs. Irvin*..... 436
 4. Where a verdict has been so rendered and entered by the jury, through mistake on the wrong writ, on the hearing of a motion at a subsequent term of the Court to transfer the verdict to the proper declaration and to enter judgment *nunc pro tunc*, and it appears from the verdict or by the admission of the party, that it was rendered on the Sabbath day, it is proper for the Court to consider that question, if made in the answer to the motion. *Ibid.*
 5. Where a case was submitted to the jury upon the agreement of counsel, that should they make a verdict before Court convened on the next morning, the foreman might take the papers and the jury disperse; which course was pursued, but upon the assembling of the jury on the succeeding day, the foreman stated to the Court that, on the previous evening, the jury had agreed upon a verdict, but that he, after they had dispersed, had become satisfied that there was an error in it, and asked that the jury be remanded to their room that the error might be corrected, it was error in the Court, after asking them in a body if any one had tampered with them or attempted to influence their opinions in any way in the matter, to which none of them made any reply, except that two of them stated that the sheriff and another person had asked them if

- they had agreed upon a verdict, to accede to the request of the foreman. *Cothran, adm'r, et al., vs. Donaldson.* 458
6. If the verdict was merely imperfect and informal, but the intention of the jury was clearly expressed, then the Court should have had the verdict put in proper form in accordance with that intention. If however, the verdict was so defective as to be void, under the law, then the Court should have set it aside and declared a mistrial. *Ibid.*

PRACTICE IN THE SUPREME COURT.

1. Where a criminal case was tried before the County Court of Dougherty county, and the defendant, upon conviction, attempted to carry the same before the Superior Court by writ of *certiorari*, but the Judge refused to sanction the petition, which refusal is assigned as error, the Solicitor General of the Albany Circuit is entitled to represent the case in this Court. *Patillo vs. The State*..... 172
2. This Court can only consider such evidence as was offered by the parties in the Court below and the legal effect of the same. *Simmons vs. Shaffer*..... 242
3. When a reversal of a judgment is asked on account of an error alleged to be committed by the Court on a question of fraud, which, it is claimed in the argument before this Court, was made and argued on the trial of the case, it should be distinctly made to appear in the record what that error was. If it be on the ground of error in the charge of the Court on the matter of fraud, the bill of exceptions should show the charge, and as it does not appear what the charge was on that point, the presumption is that it was correct. *Foster vs. Higginbotham*..... 263
4. Where, by agreement, an order was passed allowing either party to except to a decision to be rendered at Chambers within ten days, and the bill of exceptions was not certified within the time specified, but within thirty days, these facts constitute no ground to dismiss the writ of error, as the consent order did not deprive this Court of jurisdiction, whatever effect it may have as between the parties. *White et al. vs. Haslett et al., ex'rs*..... 280
5. Where a new trial was granted on an agreed state of facts, which judgment was reversed in this Court, it is

- competent for the movant to amend his motion before the judgment of this Court is made the judgment of the Superior Court, by showing that the facts were agreed to under a mistake as to their truth. *Daniel, adm'r, vs. Foster, adm'r*..... 303
6. When a judgment has been *affirmed* on a statement of facts contained in the bill of exceptions, a different question might arise, but in this case the judgment was *reversed*, and the whole case was open for further investigation, and the truth may be shown. *Ibid*.
7. Though the documentary evidence, the exclusion of which was excepted to, may be not embraced in the bill of exceptions, no motion for a new trial having been made, the writ of error will not be dismissed, but the plaintiff will be heard on exceptions to the parol evidence. *Cutts vs. Johnson*..... 370
8. Where the case stated in the body of the bill of exceptions is different from that stated in the certificate of the clerk thereto, and in the record, the error in the bill of exceptions is amendable so as to conform to the record. *Wooten et al. vs. Archer*..... 388
9. This Court cannot consider a question not made in the record before it, and the fact that the clerk of the Superior Court has sent up with the transcript a portion of the record of another case, does not make that case a part of the record of this case. *Lee vs. Armstrong*.. 609

PREScription.

1. The principle that the owner of a building erected on the line of his lot, may, by lapse of time, acquire a prescriptive right to the lateral support of the adjacent soil, does not exist in this State, especially against a public or municipal corporation. *Mitchell et al. vs. Mayor and Council of Rome*..... 19
2. To perfect a prescriptive title, the defendants and those under whom they claimed, must have been in possession of the land as their own, under color of written evidence of title and claim of right, for seven years next before the commencement of the plaintiff's action. *Turner et al. vs. Tyson et al*..... 165

PREsUMPTION.

1. Where it was a question at issue whether such consent or direction was thus given, it was error in the Court

- to charge the jury as follows: "What they (the City Council) do, so far out of the line of their own business as to be evidently done in the execution of somebody else's job, if such owner was present and knew what was going on and made no objection, will be presumed to be done by consent or direction of such property owner, if nothing appears to the contrary. But this presumption may be rebutted by any sufficient facts or circumstances, such as that the owner of the property protested against it," etc. The jury had the exclusive right in this case to determine what presumption arose from the facts proven by the evidence. *Mitchell et al. vs. Mayor and Council of Rome*..... 19
2. The legal presumption, from the absence of a judgment on the second verdict, is that it was arrested, or new a trial granted, or some other valid legal reason existed why none was rendered. *Simmons vs. Shaffer*. 242
3. Where damage has ensued by the running of cars, the presumption of negligence is against the railroad company. *Georgia Railroad and Banking Company vs. Monroe*..... 373
4. Although plaintiff's name may be on the back of the note sued on, he may recover against the maker, as the law will presume, in the absence of proof to the contrary, that an indorsement by him was never completed by delivery, or if he had delivered it so indorsed, that he had taken it up, and was again the legal holder or indorser. *Leitner vs. Miller* 486

PRINCIPAL AND AGENT.

1. An agent of a factor is not liable to a third person for failing to transmit his orders to the principal of the agent as to the sale of cotton consigned by such third person to the factor. *Reid vs. Humber*..... 207
2. Where a bill was filed against an insurance company to make them liable for certain cotton lost by the sinking of a steamboat, on the ground that their agent had fraudulently misled the owners, so as to induce them to believe that the cotton was insured by the company; and the evidence showed that the agent, for whose act the company was sought to be charged, was the agent of several other insurance companies engaged in the same business at the same place, and there was nothing in the proof to show for which of the companies the

agent was acting at the time he did the acts from which the fraud was sought to be inferred:

Held, That a verdict against the company was illegal, and without evidence to support it, and it was error in the Court to refuse a new trial. *Underwriters' Agency vs. Seabrook, adm'r*..... 463

PRINCIPAL AND SURETY.

1. Where a plaintiff, in 1869, sued two joint and several makers of a promissory note, executed in 1863, due one day after date thereof, and after the 1st day of January 1870, dismissed the action against one of the defendants and obtained a judgment against the other, there being no plea filed by the latter, such dismissal was not a discharge of the defendant against whom the judgment was rendered. If the party against whom judgment was obtained was a surety and the other was principal, the rule would be different. *McCarter vs. Turner et al.*..... 309
2. On the hearing of a bill filed by such defendant, praying an injunction against the judgment and execution issued thereon, one of the issues being whether the defendant, against whom the judgment was obtained, was the security of the party who was dismissed from the suit, the note not showing that fact, parol testimony is admissible to show what was the understanding and agreement of the parties to the note on that point, at the time of its execution. *Ibid.*

RAILROADS.

1. **WARNER, Chief Justice.** Where the widow brings suit in this State for damages resulting from the killing of her husband in the State of Alabama, through the negligence of a railroad company, the Court will be governed by the laws of this State as to the mode of procedure in ascertaining the rights of the parties, but as so what are their rights, must be determined by the laws of Alabama, where the act complained of was done. *Selma, Rome and Dalton R. R. Co. vs. Lacey.* 106
2. In a suit by a widow, in this State, against a railroad company for the killing of her husband in the State of Alabama, the declaration cannot be amended after the lapse of one year from the alleged killing, for the reason that the statute law of Alabama limits the right to re-

- cover damages therefor to one year from the time of the death, and gives the right of action to the personal representative of the deceased. *Ibid.*
3. McCAY AND TRIPPE, Judges. Where, by the law of Alabama, the personal representative of a party who is killed by the wrongful act or negligence of another, is entitled to an action for damages therefor, no other person but such personal representative can bring such action in the Courts of this State, when the killing occurred within the State of Alabama. The widow of the party killed cannot, in her own name as such widow, maintain such action. *Ibid.*
 4. Where a railroad company permits other companies or persons to exercise the franchise of running cars drawn by steam over its road, the company owning the road, and to which the law has entrusted the franchise, is liable for any injury done, as though the company owning the road were itself running the cars. *Macon and Augusta R. R. Co. vs. Mayes*..... 355
 5. All railroad companies are liable to be sued in any county in which the cause of action originated, by any one whose person or property has been injured by such railroad company, for the purpose of recovering damages for such injury, without any special notice and claim for damages therefor, as a condition precedent to his right to recover for such injury. *Georgia Railroad and Banking Company vs. Monroe*..... 373
 6. Where damage has ensued by the running of cars, the presumption of negligence is against the railroad company. *Ibid.*
 7. In an action against a railroad company on a contract instituted in a county other than the one where its chief office of business is located, the pleadings should show that the contract was either made or was to be performed in the county where such suit was brought. *Corley & Dassetts vs. Georgia R. R. and Banking Co.*... 626

RECEIVER. See *Injunction*, 4, 16.

RECOMMENDATION TO MERCY.

See *Criminal Law*, 22, 23.

REGISTRY. See *Deed*, 3.

RELIEF ACT OF 1868.

1. The tender of Confederate money in payment of two notes, one made in March, 1861, and the other in January, 1862, did not create such an equity as would authorize a jury to reduce a judgment for the full amount, under the provisions of the Relief Act of 1868. *Alexander et al., ex'rs, vs. Maltbie et al., ex'rs.* 307
2. Though the notes upon which said judgment was based may have been given for Georgia Railroad bank bills, yet a tender of Confederate money sufficient to purchase such bills will not create such an equity. *Ibid.*
3. The aid or comfort given by the plaintiff in the judgment to the Confederate government, or to its soldiers, such as the payment of taxes, the furnishing of slaves to work on fortifications, the speaking in favor of the government, or the war, the furnishing of provisions to the government and its soldiers and their families, although voluntarily done, was not sufficient to entitle the movant to have the judgment reduced under the Relief Act of 1868, as such acts did not sufficiently connect the plaintiff with the losses sustained by the movant. *Graves vs. Wingfield, ex'r*..... 386

RELIEF ACT OF 1870.

1. Where the evidence showed that the note sued on was turned over to the plaintiff, as guardian for the children of Hickey, and that they were all of age except the youngest, it was lawful for the plaintiffs to have a judgment against the defendants without proof of the payment of taxes. *Helms et al. vs. Whigham*..... 44
2. A verdict of a jury, finding that the taxes on a debt contracted before June 1st, 1865, had not been paid, is on an immaterial issue, and under the decision of the Supreme Court of the United States, in the case of *Walker vs. Whitehead*, it was error in the Court below to dismiss plaintiff's action for the non-payment of taxes under the Act of October 13th, 1870. *Mitchell vs. Cothrans & Elliott*..... 125
3. The Relief Act of October 13th, 1870, making the payment of taxes upon debts contracted prior to June 1st, 1865, a condition precedent to a recovery thereon,

- is unconstitutional. *Gardner, trustee, vs. Jeter, adm'r; Same vs. Adams*..... 195
Kimbrow vs. Bank of Fulton..... 419
4. Where an execution has been levied upon the property of the defendant, it was error in the Court to dismiss the levy on the ground that no affidavit had been filed as to the payment of taxes as required by the Relief Act of October 13th, 1870. *Griffith, for use, vs. Shipp*. 231
5. A defendant in execution who lodged with the levying sheriff, on the 15th of September, 1871, an affidavit that the legal taxes on the debt had not been paid, which affidavit was made for the purpose of arresting the sale, and did arrest the sale, and was prosecuted by the defendant to a trial as affidavits of illegality are tried, was liable, on the trial thereof, to the penalties provided by law for the filing of affidavits of illegality for delay only, provided the jury believed it was interposed for that purpose. *White et al. vs. Haslett et al., ex'rs* 280
6. On the trial of such case, the only legal issue which, under any valid law, could have been before the jury, was whether such affidavit was filed for delay only; and plaintiffs having attached to the execution an affidavit of the payment of taxes before the defendant filed his affidavit and proved the same on the trial, and the defendant offered no evidence, "We, the jury, find for the plaintiffs ten per cent. damages," was a legal verdict, and one that covered the whole issue. *Ibid.*

REMOVAL OF CASES.

See *United States Courts*, 1, 3.

RULE AGAINST OFFICER.

See *Sheriff*, 1, 2, 3, 4, 6, 7, 9, 10.

SABBATH.

1. A Judge of the Superior Court cannot open Court and receive a verdict from the jury on the Sabbath day, and such a verdict so rendered is illegal and a nullity. *Bass vs. Irvin*..... 436
2. Where a verdict has been so rendered and entered by the jury, through mistake, on the wrong writ, on the

hearing of a motion at a subsequent term of the Court to transfer the verdict to the proper declaration and to enter judgment *nunc pro tunc*, and it appears from the verdict, or by the admission of the party, that it was rendered on the Sabbath day, it is proper for the Court to consider that question, if made in the answer to the motion. *Ibid.*

SALE.

1. In a parol contract by an agent for the purchase of ninety-two bales of cotton then packed and pointed out, at a stated price per pound, estimating the bales at five hundred pounds each, subject to correction, on weighing, it being also verbally agreed that the seller should haul the cotton to a certain place for the buyer; that if it was burned it should be the loss of the buyer; that the agent need not pay the money, but hold it for the buyer to check on as he might want it, and *no act* was done by either party as to the payment or delivery, and the seller afterwards refused to deliver the cotton, and the agent returned the money to his principal :
Held, That this did not make a case of actual receipt by the buyer, or of payment, as required by the seventeenth section of the statute of frauds, so as to render the seller liable in an action of trover for the cotton. No merely verbal stipulations in the contract, and as part of the contract, are sufficient to take it out of the statute. *Bowers vs. Anderson, administrator*..... 143
2. The vendor of a fertilizer is presumed to warrant that the article sold is reasonably fit for the purpose intended. Nor is such fitness conclusively established by proof that the manufacturers, whose brand is on the particular article sold, do make an article containing fertilizing ingredients. Whether the thing sold be reasonably fit for the purpose, is a question of fact, to be determined, as other facts, by competent evidence, the composition of the article being one fact bearing upon the question, but not the only one. If, when *properly used*, it ordinarily fails to produce a good effect, it cannot be considered as reasonably fit, even though it may be shown that fertilizing ingredients are used by the manufacturers. *Sims & Company vs. Howells*..... 620

SALE—JUDICIAL. See *Judicial Sale*.

SCALING ORDINANCE.

1. Though the statement of an obligee in a bond for titles, made to his assignee at the time of its transfer, to the effect that the purchase money was payable in Confederate currency, is not admissible as evidence against the obligor, yet if there be other testimony sufficient to authorize the jury to scale the claim under the Ordinance of 1865, and they do so scale it, this Court is not bound to grant a new trial, especially if substantial justice appears to have been done. *Williams et al., executors, vs. Phipps*..... 175
2. Where a plea was filed to a note executed in October, 1861, and due January 1st, 1863, setting up what the consideration of the note was, its value at the time of purchase, and since, and that it was worth less than the amount specified in the note, and claimed that it should be scaled under the the Ordinance of 1865 :
Held, That the defendant should have been allowed to go to the jury on the plea, and to have proven what equities he was entitled to under said ordinance. *Cherry vs. Rawson*..... 228
3. Where a Confederate contract was the subject of investigation before the jury, it was error in the Court to refuse to allow the plaintiff to prove the price of corn and other articles at the date of such contract, as would have tended to have shown the value and purchasing power of Confederate money at that time, so as to have enabled the jury to adjust the rights of the parties, under the provisions of the Ordinance of 1865, on principles of equity. *Johnson vs. Gray, executor*..... 423
4. When the maker of a note, dated in 1863, pleads, that the same was payable in Confederate currency, and the only evidence on the trial is the date of the note, and that the consideration expressed therein was cotton in the gin-house of the payee, and his growing crop of cotton, the defendant being a competent witness, although the payee is dead, his evidence is the best evidence which exists of the fact sought to be proved, and should be produced. *Hudson, administrator, for use, vs. Spence*..... 479

SCHOOLS. See *Corporations*, 9, 10, 11, 12, 13.

SERVICE.

1. According to the provisions of the 3264th section of the Code, in order to traverse the entry of service by the sheriff, the defendant should show that he had done so at the first term after notice of such entry is had by him, or should show that he had no notice of the pendency of the suit against him prior to the rendition of the judgment. *Griffith, for use, vs. Shipp*.... 231
2. An affidavit of illegality to an execution having been filed on the ground of want of service, it was incumbent on the defendant to have produced the record of the suit and to have supported the allegations in his affidavit by evidence, the presumption of the law being in favor of the validity of the judgment. *Brown vs. Gill*..... 549
3. An affidavit of illegality to an execution from Whitfield Superior Court, in which the defendant alleged that he was never served with any process and copy of the declaration in the suit upon which said judgment was rendered; that he was, at the time said action was commenced and up to the date of the judgment, a resident of the county of Randolph and not of the county of Whitfield, was properly dismissed on demurrer, as it failed to disclose that he had not acknowledged service of the declaration and process, and that he had not appeared and pleaded to the merits. *Cobb vs. Pitman*..... 578

SET-OFF.

1. A legatee or the purchaser of a distributive share in an estate may, in equity, set off the same against a judgment in favor of the executor against such legatee or owner of such share, where no special reason exists for the collection of the judgment by the executor. *Dorsey vs. Simmons et al*..... 245
2. One of the shares in the estate proposed to be set off or allowed against the judgments, belongs to complainant by survivorship, and she is not affected by a previous bill filed by her husband (now deceased) for the same purpose as this, and dismissed by him. And though the judgments sought to be enjoined were obtained against her husband, yet as they are levied on property belonging to complainant and would, if col-

lected, be assets to which her legacy would attach, she has not lost her right to be heard. *Ibid.*

SHERIFF.

1. Where a sheriff levies a mortgage execution upon the land of the defendant, but before the sale was notified that the defendant's wife had had a homestead set apart in the same, and an appeal had been taken to the Superior Court, the sheriff does not render himself liable to rule by postponing the sale until the plaintiff could obtain an order of Court directing him to sell the land if it was his duty to do so. *Van Horn vs. Bradford.* 75
2. When a sheriff, shortly after the passage of the Act of 1868, known as the Relief Law, received the affidavit of a defendant according to the provisions of said Act, and received the papers as directed by the Act, and in 1872 the proceedings by the defendant, under said Relief Act, were dismissed on motion of the plaintiff:
Held, That it was not error in the Judge of the Superior Court to refuse to hold the sheriff in contempt and liable for punishment for his obedience to said law. *Franklin vs. Smith*..... 112
3. Even if the Act of 1868, known as the Relief Law, be unconstitutional, it is no *contempt* of the ordinary process of execution to obey it, if in good faith the sheriff so did. *Ibid.*
4. Where a rule absolute is rendered against a sheriff for his failure to make the money on an execution placed in his hands for collection, the defendants in execution cannot except to the judgment of the Court. Should the sheriff fail to except, and thereafter attempt to enforce the execution against the defendants for his indemnity, they will then have the opportunity to protect themselves. *White et al. vs. Haslett et al., ex'rs*..... 262
5. The sheriff, under a writ of possession based upon a judgment rendered in an action of ejectment, has no authority to receive an affidavit from a person not a party to said suit, to the effect that she did not hold possession of the land as tenant under the plaintiff or defendant in ejectment, "or any one else." *Powell et al. vs. Lawson*..... 290

6. Where a portion of an execution from the Superior Court was voluntarily paid to the sheriff by the defendant, but before the next term of the Court, executions of older date from a Justice Court were placed in his hands to claim the money, and upon a rule, the fund in the sheriff's hands was applied to the oldest execution, it was error in the Court to make the rule absolute for the full amount of the Superior Court *fi. fa.* It should have been made absolute only for the uncollected balance. *Carter vs. Cardwell & Co.; Sheats, ex'r, et al., vs. Same*..... 428
7. The refusal of a rule absolute against the sheriff for the balance due on the Justice Court *fi. fas.*, they having been placed in his hands before levy, and when there was no mandate from the Court to him to make the money on them, but for the purpose of claiming what money might be realized on the Superior Court execution, was not error. *Ibid.*
8. It was error in the Court to charge "that upon the failure of the purchaser at sheriff's sale to comply with the terms of the sale, the sheriff might lawfully put up and sell the property at a subsequent sale day, without readvertising the property, and that, in the meantime, he had the right to sell and convey the property to any person who would come forward and take the bid off the delinquent bidder's hands, and pay the money, particularly if it was acquiesced in by the delinquent bidder." *Williams vs. Barlow*..... 530
9. A rule *nisi* against a sheriff is not demurrable for uncertainty which sets forth at its head the name of the plaintiff and defendant in *fi. fa.*, the amount of the principal and interest at the date of the judgment, the Court to which the *fi. fa.* is returnable, and which alleges that the sheriff has had the *fi. fa.* long enough to have made the money. *Lee vs. Armstrong*..... 609
10. Two *fi. fas.* may be included in one rule *nisi* against the sheriff, and if one of them be not fully described, a general demurrer does not lie to the rule. *Ibid.*

SLANDER. See *Libel*.

SOLICITOR GENERAL.

See *Practice in Supreme Court*, 1.

STATUTE OF FRAUDS.

See *Frauds—Statute of*.

STATUTE OF LIMITATIONS.

See *Limitations—Statute of*.

STATUTES—CONSTRUCTION OF.

See *Laws*.

STREETS.

See *Municipal Corporations*, 2, 3, 4, 5, 6.

SUPERSEDEAS. See *Bill of Exceptions*, 1.

TAXES.

1. Under the provisions of the Constitution requiring an "equitable apportionment of the compensation of the District Judges and attorneys between the counties comprising their districts," the tax required by the Act organizing said Court to "be levied in the several counties composing each Senatorial District * * * upon the taxable property returned therein, as together, will raise an amount sufficient to pay the salaries," etc., should be apportioned between said counties in proportion to the amount of taxable property returned in said counties respectively. *Hottzclaw vs. Russ, Ordinary; Giles vs. Same*..... 115
2. The Act, approved 20th February, 1873, imposing a special tax on wholesale dealers in malt liquors, is not in violation of the 27th section of Article I. of the Constitution of the State, which says "taxation on property shall be *ad valorem* only, and uniform on all species of property taxed." *Bohler vs. Schneider et al.* 195
3. Such a tax is a tax on a business, occupation, or calling, as decided in *Burch vs. Mayor and Aldermen of Savannah*, 42 Georgia 596, and hence is not a tax on the sale of liquors, which, by the 3d section of Article VI. of the Constitution, may be assessed for educational purposes. *Ibid*

4. A tax levied on such wholesale dealers is not void for uncertainty, on the ground that the law nowhere defines what constitutes a wholesale dealer. That is a fact that can be determined like all other facts, as, for instance, whether the party taxed as a practicing attorney or assessed as the owner of certain property, is such attorney or owner. It may be ascertained in cases like this, under the provisions of section four of the Code, from experts in such business, and other proper evidence. The question whether the person so taxed is a wholesale dealer, cannot be raised on a bill to enjoin a tax collector from collecting a tax so assessed. *Ibid.*
5. The board of education created by Act of 13th of February, 1874, has no authority of law to require the Mayor and City Council of Americus to levy and collect a tax as provided by said Act. Nor can said Mayor and Council levy and collect a tax as a public school fund, except by authority of the 18th section of the Act of 22d of February, 1873, which tax, if collected, may, by virtue of said section, be used at the discretion of the Mayor and City Council for the purpose for which it was levied. *Board of Education, etc., vs. Barlow et al.*..... 232
6. The 18th section of the Act of February 22d, 1873, entitled "An Act to amend and revise the several Acts granting corporate authority to the city of Americus, and to establish and consolidate the same, and for other purposes therein named," is consistent with the third section of the Act of February 13th, 1873, entitled "An Act to establish a permanent board of education for the city of Americus, and to incorporate the same, and for other purposes," in so far as the latter Act provides for levying a tax, and to that extent said third section is repealed. *Ibid.*

TORTS. See *Libel*.

TRUSTS.

1. When, on the trial of a claim case, it appears that the defendant, *after the date of the judgment*, had conveyed the land to the claimant, and Jackson was introduced to prove that some years previous to the date of the judgment he had bought the land from defendant and

paid the consideration money, but had taken no deed or other writing, and that the deed made to the claimant by defendant was made at his (the witness') request; that he had sold the land to the claimant and received the consideration, and the defendant had, at his request, made the deed to the claimant, in pursuance of the purchase and payment several years before the judgment:

Held, That the testimony was not illegal under the rule that express trusts must be in writing. *Johnson vs. McComb, ex'r* 120

2. Where a grantee in a deed, executed in 1849, absolute on its face, but the grantor remaining in possession of the property, filed a bill in 1871 against the administrator of the grantor, alleging that there was a parol trust attached to the contract under which the deed was made, to-wit: that it was a transfer of the property in trust for the payment of a debt due the grantee and others by account, and the prayer of the bill was for a decree that the land should be sold and so appropriated:

Held, That under the allegations in the bill and the proof at the hearing, complainant was not entitled to any greater rights than a mortgagee would have where the mortgagor remained in possession, or than if the debt had been by a security under seal; and he is barred by the Act of March 16, 1869, in accordance with the decision made during the present term in the case of *John George vs. James Gardner. Davidson, administrator, vs. Lawrence, assignee*..... 335

3. A trust deed gave power to the trustees to mortgage or sell land to pay a debt of the grantor, and to raise a specified amount to be paid to the grantor, or to C. M., as either might order. The income from the balance of the trust property was to be paid to the grantor, or to said C. M. The *corpus* was to be conveyed by the trustees to such persons as the grantor might, during life or by will, appoint. If the grantor died intestate, then to hold for C. M. and her children then living, free from the debts or control of the husband of C. M. The grantor died intestate, and without executing the power of appointment. C. M. and her four children survived:

- Held*, That at the death of the grantor the children of C. M. took a present interest in four-fifths of the property, the trust as to which interest was determined, and the legal estate therein vested in the children. In such a case, a Judge of the Superior Court did not have power, on the resignation of the trustees, after the death of the grantor, to appoint a successor in the trust for the children, and on a bill filed by the *prochein ami* of the mother and children, in their name and by her consent, to grant an order in Chambers, authorizing the trustees to mortgage the whole estate, either to pay a debt or to raise money to educate the children. *Milledge vs. Bryan*..... 397
4. Where an action was instituted in the name of a plaintiff who was adjudicated a bankrupt pending the suit, and the trustee selected by the creditors, with knowledge of such suit, did not have himself made a party, but consented that the suit proceed in the name of the original plaintiff, and no exception was made to the Court's allowing the case so to proceed, but the defendant excepted to the refusal of the Court to charge the jury that if they gave a verdict for the plaintiff, they should find for him for the use of the trustee:
Held, That it was not error in the Court to refuse so to charge. *Southern Ex. Co. vs. Cannon*..... 415
5. The right of the trustee, if he has any, to the money when paid, or of the defendants, to be protected in paying it to the proper party, may be secured by proper steps being taken for that purpose. *Ibid.*

UNITED STATES COURTS.

1. A non-resident plaintiff may, by complying with the provisions of the Act of Congress of March 2d, 1867, remove his case from a State tribunal to the next term of the Circuit Court of the United States to be held in the district in which said suit is pending, and this motion may be made at a term of the Court prior to that to which said suit is returnable. *Board of Commissioners, etc., vs. Hurd*..... 462
2. A county being suable by law in the State tribunals, is, though a portion of the State, subject to suit in the United States Courts. *Ibid.*
3. Suits may properly be removed from a State Court

into the Circuit Court of the United States, where the jurisdiction of the Circuit Court, if the suit had been originally commenced there, could not have been sustained. *Ibid.*

4. A State Court will not grant an injunction restraining a party from applying for the benefit of the Bankrupt Act under the bankrupt law of the United States. *Fillingin vs. Thornton*..... 384

USURY.

1. When A filed a bill against the City Bank of Macon, charging that he was the holder of a mortgage made by B on certain real estate, founded on a valuable consideration; that the said City Bank was also the holder of a mortgage made to it by B upon the same property; that the mortgage to the bank was given to secure the payment of a note made to the bank by B for the loan of money at more than seven per cent. per annum, and was therefore null and void; that it was of older date than the mortgage to A; that the junior mortgage contained upon its face notice of the mortgage to the bank; that the mortgage to the bank had been regularly foreclosed by rule *nisi*, notice and judgment of the Superior Court of the county of Putnam, where the land was situated, and ordered to be sold to satisfy it; that B was insolvent, and that unless A could set aside this illegal mortgage, he would lose his money. The bill prayed an injunction. The defendant, on the rule to show cause, denied there was equity in the bill, and insisted that if the complainant had any remedy, it was at law, under sections 3903 and 3892 of the Revised Code. The Judge refused the injunction, and the complainant excepted:

Held, That there was no error in the judgment of the Court refusing the injunction. Admitting that the note, to secure which the mortgage to the bank was given, is null and void for usury, if the complainant has any remedy, it is only under sections 3903 and 3892 of the Code, and as that remedy, if it applies to his case, is made ample and complete, equity has no jurisdiction. *Gatewood vs. City Bank of Macon et al.* 45

2. It is a well settled rule of law that parties may, if they please, *really* and *truly* sell property for a consideration actually passing, and at the same time secure

the right to repurchase it at a future time for an agreed price, and if this be really the intent of the parties, the law will enforce it. It is also true that the difference between such a transaction and a mortgage is often a very nice one, and that the Courts will scrutinize the matter very closely to discover whether there was, in fact, anything more intended than to provide a security for money due or advanced at the time, and all the facts will be looked to in search of the truth of the case. The great cardinal rule for testing the intent seems to be whether or not the relation of debtor and creditor was intended to exist between the parties—whether the property was taken in *satisfaction and discharge* of the sum due or advanced; or whether, notwithstanding the words of the conveyance, the relation of debtor and creditor was still to exist, to-wit: the right of the one to demand, and the obligation of the other to pay. Under this rule, we think, from the bill and answers, that the transaction begun in June, 1871, by the complainant's offer, and accepted and acted on by both in September, 1871, as evidenced by the complainant's proposal, the defendants' acceptance, and the deed, lease, bond and payments, furnish, so far as appears from the face of the papers, or from any facts appearing at the hearing, taking the answers of the defendants as evidence, was a contract of sale, lease and agreement to permit the complainant to rebuy, and not a loan of money, and scheme to evade the usury laws; at least, that under the uncontradicted answers of the defendants, it was error in the Judge to have considered the charges of the bill so far made out as to justify the injunction on that ground. What may be the truth of the case, as it may be made out at the trial before a jury, is not now the question. *Spence et al. vs. Steadman*..... 133

3. Where A approached B for the loan of money, offering a mortgage upon property to secure the repayment, and B declined, but said that A could get the money if he would *deed him* the property, and A made an absolute deed, taking B's bond to *deliver back the deed* on the payment by A of a sum which was just the amount of the money got by A, with a certain amount per month rent, and the possession was not changed in fact, nor the deed recorded :

Held, That whether the transaction was a sale with a right in the vendor to repurchase, or whether the whole was a ruse devised to evade the usury laws and to take a security for the loan of money, was a question of fact for the jury, and the jury having, under the evidence, decreed the cancellation of the deed on the payment of the amount due, the verdict ought, under the evidence in the record, to stand. *Monroe vs. Foster*..... 514

VENDOR AND PURCHASER.

1. Land was sold at auction by S.; C., gave notice at the sale of claim of title; S. replied that he would warrant the title, and would give to the purchaser a bond, with ample security, to indemnify him against the loss of any sum that might be expended in improvements upon said property. Complainant purchased for \$1,010 00, and paid one-fourth of the purchase money in cash, and gave his three notes for the remaining three-fourths, taking the usual bond for titles from S. Two of these notes were paid at maturity. The remaining one was dishonored, because C. had commenced suit for the land. In the meantime, complainant had placed improvements thereon to the value of \$400 00. S. obtained judgment for the amount of the last note, filed a deed to the land in the clerk's office, and has levied the execution upon the same. The Chancellor did not commit error in enjoining the sale, the injunction to be dissolved upon bond and security being filed by S. in the sum of \$1,000 00, conditioned to indemnify complainant against loss on his improvements in case of the failure of his title. *Seago et al. vs. Bass*..... 9
2. A sale of land by an administrator *cum testamento annexo*, made under an order of the Court of Ordinary, to pay the debts of the testator, where the estate is insolvent, discharges the land of the lien of the vendor for the unpaid purchase money, and the creditor must look to the proceeds in the hands of the representative of the estate. *Stallings, ex'r, vs. Ivey, adm'r*..... 274
3. F. owning certain mills, sold, in September, 1860, one-half interest therein, with all necessary water privileges, to W. and C. for \$7,444 00, with warranty. The deed was duly recorded. In November, 1861, W. and C. reconveyed the same, with warranty, to F.

for \$8,500 00. In January, 1867, F. sold one-half of said mills to T., and in January, 1868, at United States Marshal's sale, under execution against F., T. and E. purchased the other half. When F. sold to W. and C., and when the reconveyance was executed by them to him, the water, on account of the mill-dam, was backed upon and overflowed the land of W. and C., and also land owned by other persons. The latter, by legal proceedings in 1872, caused the dam to be taken down, thereby impairing the value of the property. For this, as a breach of the warranty of W. and C., an action of covenant was brought :

Held, That as the warranties in the respective deeds of F. and of W. and C. were substantially the same, although the latter deed was for a larger consideration than the former, F. would not be entitled to recover for a breach of the warranty of W. and C. for a cause existing at the time F. made his warranty. *Fields, for use, vs. Willingham et al.*..... 344

4. Subsequent vendees holding under F., whether purchasing at public or private sale, are affected by the equities existing between F. and W. and C., especially if they had notice of the facts upon which those equities are founded. *Ibid.*
5. A judgment for the purchase money of land, where the land has been sold for its satisfaction but does not fully discharge the debt, is not such an incumbrance or lien on the crop made on the premises, which was matured and gathered before the levy on the land, as will defeat the right of the family of the vendee to the crop as an exemption, etc., under the homestead law. *Johnson vs. Holmes* 365

VENUE.

1. The defendants cannot, by cross-bill, claim damages from the complainant who resides in a different county, alleged to have been sustained by the wrongful suing out of the writ of injunction in said case. *Husseys, administrators, vs. Neal et al.*..... 160
2. All railroad companies are liable to be sued in any county in which the cause of action originated, by any one whose person or property has been injured by such railroad company, for the purpose of recovering dam-

- ages for such injury, without any special notice and claim for damages therefor, as a condition precedent to his right to recover for such injury. *Georgia Railroad and Banking Company vs. Monroe*..... 373
3. If an issue be made upon a lien foreclosed under the steamboat lien law by affidavit, or if there be a claim to the property, the papers are to be returned and the issue tried in the county of the residence of the defendant. *Hardeman & Sparks vs. De Vaughn*..... 596
4. In an action against a railroad company on a contract instituted in a county other than the one where its chief office of business is located, the pleadings should show that the contract was either made or was to be performed in the county where such suit was brought. *Corley & Dassett vs. Georgia Railroad and Banking Company* 626

VERDICT.

1. Where, for a valuable consideration, the defendant covenanted to pay to the plaintiff whatever amount he might recover in a suit then pending against R., on a note dated in March, 1862, and due twelve months after date, for \$3,500 00, besides interest, and at the September term of the Court, 1866, a judgment was rendered in said suit for \$1,990 34 with interest and costs, and at the March term, 1871, under the provisions of the Relief Act of 1868, said judgment was reduced by the verdict of a jury to the sum of \$700 00, upon which last verdict no judgment appears to have been entered, it was error in the Court to direct the jury to find for the plaintiff the amount last aforesaid. *Simmons vs. Shaffer*..... 242
2. The legal presumption, from the absence of a judgment on the second verdict, is that it was arrested, or a new trial granted, or some other valid legal reason existed why none was rendered. *Ibid*.
3. Where, upon the trial of a case arising under the forcible entry and detainer law, the jury reported to the presiding Justice that they could not agree upon a verdict, and the magistrate told them that they must agree or he would take them with him to Blakely, and the jury subsequently returned a verdict for the defendant, but upon being polled, two of them stated that

they had consented to the verdict, but had not agreed to it, and the Justice received the verdict over the objections of the plaintiffs:

Held, That the proceeding was illegal. *Powell et al. vs. Lawson* 290

4. Where a case was submitted to the jury upon the agreement of counsel, that should they make a verdict before the Court convened on the next morning, the foreman might take the papers and the jury disperse; which course was pursued, but upon the assembling of the jury on the succeeding day, the foreman stated to the Court that, on the previous evening, the jury had agreed upon a verdict, but that he, after they had dispersed, had become satisfied that there was an error in it, and asked that the jury be remanded to their room that the error might be corrected, it was error in the Court, after asking them in a body if any one had tampered with them or attempted to influence their opinions in any way in the matter, to which none of them made any reply, except that two of them stated that the sheriff and another person had asked them if they had agreed upon a verdict, to accede to the request of the foreman. *Cothran, administrator, et al. vs. Donaldson*..... 458
5. If the verdict was merely imperfect and informal, but the intention of the jury was clearly expressed, then the Court should have had the verdict put in proper form in accordance with that intention. If, however, the verdict was so defective as to be void, under the law, then the Court should have set it aside and declared a mistrial. *Ibid.*
6. The affidavits of jurors are not admissible to impeach their verdict. *King et al. vs. King et al.*..... 622

WAIVER. See *Certiorari*, 3.

WAR.

Title to personal property by capture on land during a war, can only be set up by the organized and recognized parties to the war, or by those acquiring title from them, according to the orders and regulations prescribed by the governments and their military authorities. *Huff vs. Odom*..... 395

WAREHOUSEMAN. See *Interest*, 2.

WARRANTY.

1. F., owning certain mills, sold, in September, 1860, one-half interest therein, with all necessary water privileges, to W. and C. for \$7,444 00, with warranty. The deed was duly recorded. In November, 1861, W. and C. reconveyed the same, with warranty, to F. for \$8,500 00. In January, 1867, F. sold one-half of said mills to T., and in January, 1868, at United States Marshal's sale, under execution against F., T. and E. purchased the other half. When F. sold to W. and C., and when the reconveyance was executed by them to him, the water, on account of the mill-dam, was backed upon and overflowed the land of W. and C., and also land owned by other persons. The latter, by legal proceedings in 1872, caused the dam to be taken down, thereby impairing the value of the property. For this, as a breach of the warranty of W. and C., an action of covenant was brought :
Held, That as the warranties in the respective deeds of F. and W. and C. were substantially the same, although the latter deed was for a larger consideration than the former, F. would not be entitled to recover for a breach of the warranty of W. and C. for a cause existing at the time F. made his warranty. *Fields, for use, vs. Willingham et al.*..... 344
2. Subsequent vendees holding under F., whether purchasing at public or private sale, are affected by the equities existing between F. and W. and C., especially if they had notice of the facts upon which those equities are founded. *Ibid*.
3. Where the failure of title, set up as a breach of warranty in defense to a suit for the purchase money of land, was the result of the act of the defendants, a verdict for the plaintiff will not be interfered with. *Reagan et al. vs. Galloway*..... 452
4. The vendor of a fertilizer is presumed to warrant that the article sold is reasonably fit for the purpose intended. Nor is such fitness conclusively established by proof that the manufacturers, whose brand is on the particular article sold, do make an article containing fertilizing ingredients. Whether the thing sold be

reasonably fit for the purpose, is a question of fact, to be determined, as other facts, by competent evidence, the composition of the article being one fact bearing upon the question, but not the only one. If, when *properly used*, it ordinary fails to produce a good effect, it cannot be considered as reasonably fit, even though it may be shown that fertilizing ingredients are used by the manufacturers. *Sims & Co. vs. Howells*..... 620

WEIGHTS AND MEASURES.

1. Section 1585 of Irwin's Revised Code, requiring persons who shall sell by weights and measures to have their weights and measures marked as correct by the clerk of the Inferior Court, (now the Ordinary,) and in default of such marking, providing that such persons shall not collect any account, note or other writing, the consideration of which is any commodity sold by their weights and measures, is an Act fixing a penalty, and is not to be extended beyond its terms. *South-western R. R. Co. vs. Cohen*..... 627
2. Where a lot of paper and paper bags was shipped to the plaintiff by railroad, and upon its receipt, it was weighed upon scales not marked, but which were proven to be correct, and the paper was found deficient in quantity, as described in the railroad receipt, it was not error to admit the evidence of the weighing, notwithstanding the failure to procure the marking of the scales. *Ibid.*

WILLS.

A testatrix made her will in 1863 and died. By one item of her will, she directed her executors to keep up her plantation in Quitman county, and work her slaves thereon, declaring that she desired this to be done "for the purposes hereinafter to be mentioned." In the same item she directed her executors, in case the plantation should be unprofitable, or there should be danger of a depreciation or loss of her property, to sell the same, in their discretion, and invest the proceeds in interest-bearing securities. In the next item, she gave certain amounts of money to her nephews and nieces, "to be paid out of the plantation, without interest, after paying all expenses arising from its pru-

dent management." In another item, she gave all the use of her estate to her son, her only living child, appointing her husband his guardian, and directing that her husband should hold the property as trustee for her son, and receive the profits in trust for his use during the life of the husband, but without accountability, he to preserve the *corpus* of the estate for the son. She appointed her husband and his brother her executors. The testatrix died in 1864. The slaves were emancipated, and it then became impracticable to carry out the scheme of working the plantation with the slaves, and thus raising the means to pay these legacies :

Held, That taking the whole will together, the testatrix intended the legacies to her nephews and nieces to be paid only out of the profits to be made by working the slaves upon the land, and that, as this became impossible on the emancipation of the slaves, the legacies to the nephews and nieces fail with the failure of the fund, and the *corpus* of the estate went to the son free from any charge to pay the legacies to said nephews and nieces. *Tennille vs. Phelps et al.*..... 532

WITNESS.

1. It is for the jury to determine what credit shall be given to the evidence of an impeached witness. *Shor-ter vs. Marshall*..... 31
2. When, on the trial of a claim case, it appears that the defendant, *after the date of the judgment*, had conveyed the land to the claimant, and Jackson was introduced to prove that some years previous to the date of the judgment he had bought the land from defendant and paid the consideration money, but had taken no deed or other writing, and that the deed made to the claimant by defendant was made at his (the witness') request; that he had sold the land to the claimant and received the consideration, and the defendant had, at his request, made the deed to the claimant, in pursuance of the purchase and payment several years before the judgment:
Held, That Jackson was a competent witness, under the evidence Act of 1866, notwithstanding the death of defendant, the maker of the deed. *Johnson vs. McComb, ex'r.*..... 120

3. There being nothing in the record showing that the case was not fairly submitted to the jury, and as the verdict was to be determined according to the credit they might give to the testimony of a witness who was a party to the suit, this Court will not interfere by setting aside the verdict, especially as it does not appear that the jury abused their right in the premises as to the credibility of the witness, under the circumstances exhibited in the record. Under the Act of December 15th, 1866, juries have a larger discretion as to the credit they will give such witnesses, than in the case of witnesses who are not parties. *Penny vs. Vincent..* 47
4. When the maker of a note, dated in 1863, pleads, that the same was payable in Confederate currency, and the only evidence on the trial is the date of the note, and that the consideration expressed therein was cotton in the gin-house of the payee, and his growing crop of cotton, the defendant being a competent witness, although the payee is dead, his evidence is the best evidence which exists of the fact sought to be proved, and should be produced. *Hudson, adm'r, for use, vs. Spence* 47
5. The testimony of a witness was taken by interrogatories. When the case was tried, the witness being present, was introduced and examined orally. On a subsequent trial of the same case, the witness then being absent, his depositions were read. The adverse party was allowed to prove, by way of impeachment, that the evidence of the witness, when examined in Court on the first trial, was different from his testimony as it appeared in the interrogatories. The defendant, in whose behalf the interrogatories were read, had testified on the trial that the witness had stated to him what was substantially the same as was proven by the impeaching witness:
Held, That the admission of the testimony is no ground for a new trial. *Guerry, Oatis & Co. et al. vs. Brown.* 521

YEAR'S SUPPORT.

1. Where an executor advances a support to the family of the deceased, although not specifically set apart by appraisers, he is entitled to be credited with it in accounting with the creditors and heirs, the burden being

- on him to show that it was a proper and necessary amount. *Simmons vs. Byrd et al.*..... 285
2. It is immaterial who makes the application for the twelve months' support for the family of the deceased, so that the representative of his estate has notice; therefore such an application by the temporary administrator and the action of the Ordinary thereon, is not void as against creditors. *Mackie, Beattie & Company vs. Glendenning, administrator, et al.*..... 367
3. Where, in March, 1872, a homestead in the realty and personalty of the husband was set apart to the wife, and a levy of an execution immediately afterwards made on the balance of the land, and the husband died in April, 1872, pending the levy, the wife is not entitled to twelve months' support out of the proceeds of the sale of such balance. If there be special grounds set up by the wife, such as that the homestead exemption is not of the value of the twelve months' assignment, she should show that fact. *Singleton et al. vs. Huff*..... 582





